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THE

# JUSTICE'S MANUAL,

WITH

The Justices' Statute,

AND NOTES THEREON.

BY

JAMES JOSEPH CASEY,

BARRISTER-AT-LAW.



CHARLES F. MAXWELL, 74 CHANCERY LANE,  
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## PREFACE.

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THE materials for the following pages were collected for my own use, during the earlier years of my professional practice. I had been led to hope that they might prove not unacceptable to the public, and I therefore ventured to seek for them a wider scope than that for which they were originally designed. After, however, I had commenced the task of preparing for the press my notes, other and engrossing duties devolved upon me, and I was compelled for some months to forego my original intention. I am indebted to the kindness of my learned friends, Mr. J. T. Thorold Smith, LL.B., and Mr. P. Stevenson Davis, M.A., for assistance, without which I could not, at least at present, have brought my labours to a conclusion. Mr. Smith has revised the First Part of this book, and verified the references that it contains ; and Mr. Davis has digested and arranged the cases already collected for



Second Part, has enriched it with some additional notes and references to the most recent cases, and has also performed the laborious duty of the correction of the press for the whole of this work.

My object has been the preparation of a book which, I trust, will be useful, not only to the members of the legal profession, but to justices of the peace, clerks of petty sessions, and that large portion of the public who have, in whatever capacity, business to transact before magistrates. I have spared no pains to render the information which it contains as full and as accurate as I could make it. I have been careful to state nothing as law which is not fully recognised and established as such; and when I have hazarded an opinion of my own, I have always pointed out the character of the assertion, and stated the grounds upon which my inferences rested. The First Part of this book contains an epitome of so much of the general principles of law as appears to be practically useful to justices, in the performance of their duties. The Second Part, which contains "The Justices of the Peace Statute, 1865," with notes, is mainly concerned with the procedure before justices, or concerning them. A Third Part, containing the law relating to the authority, both ministerial and judicial, of justices,

is nearly ready for the press. If I should have the good fortune to obtain the favour of the public for my present attempt, I hope, when duties that are now pressing admit of a little leisure, to be able at no distant day to complete my undertaking.

36 TEMPLE COURT,

MELBOURNE, *November, 1872.*



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PART I.



# THE JUSTICE'S MANUAL.

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## CHAPTER I.

### THE APPOINTMENT OF JUSTICES OF THE PEACE.

BEFORE dealing with the several subjects over which CH. I., § 1. justices have jurisdiction, it will be desirable to inquire into the mode of appointing justices of the peace.

(1.) In the mother country, before the 1 E. III., c. 16, there were no justices of the peace, and it was by virtue of that statute that the office was first instituted. Appointment of Justices. By the common law there were conservators of the peace, both ordinary and extraordinary. The latter were persons specially commissioned, in times of imminent danger, to take care of, and defend, particular districts. How Justices are appointed in England. These had power to command the sheriff, with his whole *posse*, to assist them. The "ordinary" conservators of the peace were chosen by the freeholders of a county. Their power appears to have been no greater than that of constables of the present day (*a*). The principle of popular election, in the choice of magistrates, which pervaded the Anglo-Saxon institutions, and seems to have characterised, from the earliest times, the policy of all those northern nations from which they emanated (*b*), was set aside by the Act above referred to, which removed the choice from the people, and ordained that thenceforth persons should

(*a*) IV. Bac. Ab. 602.

(*b*) *Tacit. de Mor. Ger.*

CH. I., § 2. be *assigned* (*i.e.*, by commission) to keep the peace. Those so assigned acquired the title of justices of the peace, and were so styled in 34 E. III., c. 1, which is made the foundation of the commission of the peace.

It was held in a modern case that the validity of the commission, which had been in operation for centuries, could not be questioned (*c*). The authority of justices has been gradually extended by various statutes, but they have no jurisdiction beyond that given them by statute, the office having been created within the time of legal memory (*Salkeld*, 406, *pl.* 2).

The power to take sureties for good behaviour, is given by the 34 E. III., c. 1.

Limits of  
Justices'  
jurisdiction in  
Victoria.

(2.) In Victoria justices are assigned to keep the peace under the combined authority of the Governor's commission, sec. V. (*d*), and the Justices of the Peace Statute, No. 267, sec. 5 (*e*), while others are appointed specially by statute. The latter class consists of mayors of cities (*f*) and of boroughs (*g*), presidents of shires (*h*), chairmen of general sessions (*i*), and coroners (*j*). With the exception of the Mayors of Melbourne and of Geelong, who have only jurisdiction within their city and town respectively, justices of the peace have jurisdiction within the general sessions district for which they may have been appointed, and are removable from office at the pleasure of the Governor-in-Council (*k*). Mayors and presidents, however,

(*c*) *R. v. Dunn*, 12 A. & E. 617.

(*d*) 5 V.S. 132.

(*e*) 2 V.S. 236.

(*f*) 4 V.S. 162.

(*g*) No. 359, sec. 117.

(*h*) No. 358, sec. 134.

(*i*) No. 267, sec. 8; 2 V.S. 236.

(*j*) No. 253, sec. 4; 1 V.S. 413.

(*k*) The General Commission was last issued and published in the *Government Gazette* of 5th January, 1869. The commission purports to have been issued by the Governor in Council in the name of the Queen, and having assigned all the persons therein



can only sit as justices within the corporate limits of their districts. The justices, appointed by several commissions, consist of two classes—members of the Executive Council, and police magistrates, who have jurisdiction throughout the territory—and the others, who, with a few exceptions, are assigned to particular districts, as county justices are in Great Britain (*l*). All are removable at the pleasure of the Governor-in-Council, and this may be effected expressly, by a notice in the *Government Gazette*, removing the name of any justice from the roll of magistrates, or impliedly, by the issue of a new commission leaving out the former justices' names (*m*).

CH. I., § 2.

Executive  
Councillors.Police  
Magistrates.

Until notice of removal, or the publication of the new commission, the acts of the former justices are good in law (*n*).

named to keep the Queen's peace in the colony of Victoria, and all ordinances and laws for the good of the peace and the preservation of the same, and to chastise and punish all offenders, it proceeds to authorise them, with the aid of a jury, to inquire the truth of all manner of felonies, trespasses, and misdemeanours, and to hear and determine all and singular the felonies, trespasses, and misdemeanours aforesaid, and all offenders for such offences according to the said ordinances and laws, to chastise and punish; and to exercise such further and other jurisdiction as by the laws in force in the said colony of Victoria they may lawfully do. They are then directed to keep the peace; to meet at certain places on certain days; and the sheriffs are commanded to provide juries.

The only difference between the commission for the territory and the general sessions districts, is—that the former assigns generally to keep the peace in the colony of Victoria, while the latter assigns to keep the peace in the colony of Victoria, acting within and for the — district.

(*l*) Dalt., c. 3.

(*m*) "It is quite true that the granting by the Crown of a subsequent commission, determines altogether a prior commission of the same nature, and 'commissions of the peace are permanent, intended to continue during the king's reign, unless new commissions of the peace of precisely the same nature are issued.'" Per Coleridge, J., in *Smith v. the Queen*, 18 L.J., M.C. 207.

(*n*) Dalt., c. 3.

CH. I., § 3, 4.

Special  
powers of  
particular  
Justices.

(3.) Police magistrates have special powers conferred upon them by statute, and except when the contrary is expressly provided, any one of them may do alone, whatever any two or more justices are by law authorised to do (*o*). No specific provision is made for the appointment of police magistrates, but the Supreme Court held, however, on the question being raised, that there was ample authority provided by the Constitution Statute, sec. 37, and the Governor's commission (*p*).

Jurisdiction  
independ-  
ently of  
statute.

(4.) It has been already stated that justices have no jurisdiction beyond what has been conferred by statute. The various jurisdictions will be dealt with in their order. It will be well first, however, to refer to certain matters over which justices in this colony exercise jurisdiction without the authority of statute. Take for example, the every-day cases of "binding to keep the peace," taking sureties for good behaviour, and the issuing of search warrants to recover stolen property. We have seen that the statute of Ed. III. authorised the assigning of certain persons to keep the peace. The commission issued under that statute was valid, and could not be inquired into (*q*). The terms of that commission authorised justices to bind to keep the peace, or to take recognisances for good behaviour, or sureties for the peace, "as it is an incident to the office of every justice of the peace, by virtue of his commission, to award process for the surety of the peace, and to take recognisances for it" (*r*). All the authority which the ancient conservators of the peace had, is now conferred upon justices of the peace by their commissions (*s*). As to the issuing of search warrants for

(*o*) No. 267, sec. 9, 2 V.S. 236.

(*r*) 2 Hawk. c. 8, s. 2; Dalt.

(*p*) *Ex parte Hargreaves*, 1

196.

A.J.R., 23.

(*s*) Dalt. c. 5, p. 15; 1 Hawk.

(*q*) *R. v. Dunn*, 12 A. & E. 617.

P.C., 490; 11 St. Tr., 316.

the recovery of stolen property, there appears to be, CH. I., § 5, 6.  
 in Victoria, no direct statutory authority. There is a  
 form of search warrant given as a schedule to the  
 Justices Act, and such form, the 4th section of the Act  
 states, "may be used, and shall be deemed to be good,  
 valid, and sufficient in law" (*t*).

(5.) The functions of a justice are both ministerial Ministerial  
and judicial  
functions.  
 and judicial. The latter are coercive, and cannot be  
 exercised out of his district, while the former, it is said,  
 may be so exercised (*u*). A magistrate for the  
 county of Bucks, it was held, could administer an oath  
 in London (*v*). The backing of a warrant is minis-  
 terial, while the issuing of the warrant is judicial (*w*).  
 In all judicial proceedings where justices have power  
 to hear and determine, they may make a conviction or  
 an order, and in many cases they possess an authority  
 which does not embrace either, as in proceedings to  
 eject over-holding tenants.

(6.) Justices in general sessions have power to hear General  
Sessions.  
 and determine all felonies and misdemeanours, except  
 those particular offences excluded from their jurisdic-  
 tion by the 27th section of the Justices Act, by the  
 Trustee Act, and the 148th section of the Criminal Law  
 and Practice Statute, No. 233. They have power also  
 to hear appeals from justices. The court is a court  
 of record, and is presided over by a chairman, who  
 must be a barrister-at-law of five years standing.

(*t*) 2 V.S., p. 308.

(*u*) 2 Hawk. P.C. ch. 8, sec.  
 47; Dalt. c. 25.

(*v*) *Helier v. Benhurst*, Cro.  
 Car. I., 211; W. Jones, 239; *R.*

*v. All Saints, Southampton*, 7 B.  
 & C. 785; and see *Bosanquet v.*  
*Woodford*, 5 Q.B. 310.

(*w*) *Painter v. Liverpool Oil*  
*Gas Light Co.*, 3 A. & E. 433.

## CHAPTER II.

### THE ADMINISTRATION OF JUSTICE.

CH. II., § 7.

General principles in the administration of justice.

No Judge should preside where he is interested.

(7.) It is now proposed to indicate the general principles that should be applied in the administration of justice. And first of all it is of essential importance that the justice should not be directly, or indirectly, interested in the subject of contention, or in the parties to the cause. The slightest pecuniary interest will invalidate the proceedings. The mere possibility of bias, is no ground of objection (*a*), nor that the proceedings were instituted by direction of the justice (*b*), though magistrates would best consult their own honour and the dignity of their office, if they were to decline adjudicating upon any case where their motives could be misunderstood. The objection is sometimes taken to some magistrate sitting on the bench in a particular case, perhaps to annoy, or upon an unfounded suspicion of interest. In either case a sensitive mind would be disposed to resent the imputation as impertinent, but it should be borne in mind that it is the right of every party to a cause, to challenge a jurymen without stating a reason, and where there are several justices who may sit on the bench, it is not unreasonable that either party may object to a particular justice. An objection, if properly made, might be acquiesced in by the magistrate challenged, without any greater reflection being cast upon his impartiality, than is pre-

(*a*) *Ex parte Pettitmangin*,  
33 L.J., M.C. 99, note 3.

(*b*) *Wildes v Russell*, 14 W.  
R. 796; S.C., L.R., 1 C.P. 722.

sumed in the case of a juryman who is requested to stand aside. It is the public justice that magistrates administer, and the parties affected ought to be permitted to feel that their dispute was heard by uninterested and unbiassed judges. The great principle—that “no man should be a judge in his own case”—has, for convenience sake, been trenched upon by statute; *e.g.*, in exempting judges who reside in Melbourne, from its operation, when deciding questions in which the city corporation is interested (*c*), and justices who are either ratepayers or members of a borough or shire council, when the interests of the borough or shire are concerned. The exemption did not extend to County Court judges, and in a case where a County Court judge adjudicated, he being a ratepayer in the shire, and the shire council being one of the parties to the cause, the Supreme Court restrained the further execution of such judge’s decision (*d*).

(8.) It is a fundamental maxim of our system of jurisprudence, that both sides should be heard. The Great Charter says (*e*), “No freeman shall be taken, or imprisoned, or disseised, or outlawed, or banished, or in anyways destroyed; nor will we pass or send upon him unless by lawful judgment of his peers, or by the law of the land.” Unless the statute expressly dispenses with the presence of the accused in cases other than of a civil character, the justices cannot proceed to hear the case, and, although there is a general power given to magistrates to hear cases *ex parte*, that does not dispense with the necessity of a previous summons; and unless there be an express taking away of the subject’s right to be informed when the process of law is about to be enforced against him, magistrates

(*c*) 6 Vic., No. 18, sec. 1; IV. V.S. 184.

(*d*) *Molloy v. Gunn*, 2 W. & W., L. 76.

(*e*) Magna Charta, sec. 43.



CH. II., § 8. will not be justified in acting without having both parties before the court, whether the cause be civil or criminal. Under the Municipal Institutions Act, 18 Vic., No. 15, sec. 32, it was provided that if after twenty days' notice, the rates were not paid, "it shall be lawful for any justice on proof of any such notice having been served personally . . . to issue his warrant for the levying of the amount, &c." It was held that, although a notice was given by the rate collector, it was not sufficient; a summons must be issued. The defendant may wish to show cause against the issuing of the warrant, on various grounds, such as mistaken identity, non-occupancy, ownership, or agency, or that the rate was not due, or was paid by some one else, or to another officer (*f*). The same principle was followed in respect to an order made upon a Shire Council, under the Lunacy Statute (*g*). The same principle extends to courts of superior jurisdiction. Where a County Court judge ordered a defendant to pay the amount of the claim against him, at a future day, or *in default be committed*, the defendant, on making default, cannot be committed without being examined as to the cause of such default, for it may have been impossible for the debtor, by reason of circumstances beyond his control (which he ought to have had an opportunity to explain), to obey the former order (*h*). "The laws of God and man," says Fortescue, J., (*i*) "both give the party an opportunity to make his defence, if he have any," and immemorial custom cannot avail in contravention of this principle (*j*).

(*f*) *Taylor v. Patterson*, 2 W. & W., L. 32; *Andrews v. Municipal Council of Fitzroy*, S.C.V. 26-11-61.

(*g*) *Reg. v. Panton*, 6 W.W. & A'B., L. 6.

(*h*) *Abley v. Dale*, 10 C.B. 62; *Davis v. Riley*, 11 C.B. 434.

(*i*) *Dr. Bentley's case*, R. v. Chancellor of Cambridge, 1 Str. 557; *ex parte Ramshay*, 18 Q.B. 190; 14 C.B.(N.S.) 194, per Byles, J.

(*j*) *Williams v. Lord Bagot*, 3 B. & C. 772.



(9.) While "it is the duty of a judge (of the superior courts), when requisite, to amplify the limits of his jurisdiction," care should be taken not to usurp jurisdiction. The true meaning of this maxim is to amplify the remedies, and, without usurping jurisdiction, to apply all available legal remedies to the advancement of substantial justice (*k*). In the course of the hearing of a cause, questions of title occasionally arise, and it is worthy of consideration to define in what cases the justices' jurisdiction would be thereby ousted. It by no means follows that a magistrate cannot hear and determine a question of title. The principle of law that ousts the jurisdiction of magistrates when questions of title arise, is not founded merely upon legislative provision; it is a qualification which, it is held, the law itself raises. On the other hand, there are statutes that give either an express (*l*), or an implied (*m*), authority to justices to determine questions of title. The rule to be deduced from decided cases appears to be that, when, in the opinion of the justices, the case cannot be decided without also deciding upon a question of title that incidentally arises, they should decline (*n*) to proceed. They have, however, jurisdiction to inquire and ascertain whether such a question does arise (*o*), but they cannot give jurisdiction to themselves by deciding that no such question does arise (*p*); but if the statute they are then administering, contemplates any inquiry into title, they have jurisdiction, even though they have expressly to decide upon a question of title (*q*). And the same limitation exists, as regards title

CH. II., § 9.

Justices should not be prone to limit their jurisdiction.

Where a claim of title to land is raised.

(*k*) Per Lord Abinger, C.B., *Russell v. Smyth*, 9 M. & W. 818; and per Lord Mansfield, C.J., 4 Burr 2239, et passim; *Kelsall v. Marshall*, 1 C.B. (N.S.) 255.

(*l*) No. 360, sec. 23.

(*m*) No. 192, sec. 90.

(*n*) *R. v. Webster*, 1 A.J.R. 78; 1 V.R., L. 82.

(*o*) *Gateley v. Kendall*, S.C.V. 27-1-64.

(*p*) *R. v. Dowling*, A.R. 7-12-66.

(*q*) *Ex parte Vaughan*, L.R. 2 Q.B. 114.

CH. II., § 10. to office (*r*). The title to land must be actually in dispute, since a mere claim of title will not oust the magistrate's jurisdiction (*s*). On the other hand, under colour of a complaint of trespass to land, or injury to property, the title to the land itself should not be inquired into (*t*); the validity of instruments conveying title to property, may be inquired into by justices, as bills of sale (*u*), the transfer of shares (*v*), the validity of a rate (*w*), or a lease of Crown lands (*x*).

Fictions of law.

(10.) Magistrates are sometimes induced to administer what they consider to be equity, and in so doing, to ignore the provisions of a statute, or settled rules of law. Technical points or fictions of law, when not understood, are not unfrequently regarded as impediments to the administration of justice, and justices are

(*r*) *Brown v. Stephens*, S.C.V. 2-9-64; Ad. on Torts 608.

(*s*) *Robinson v. Carey*, 2 W. & W., L. 114; *Chew v. Holroyd*, 22 L.J., Ex. 95; *Wright v. Cattell*, 19 L.J., Ch. 527.

(*t*) *Degraves v. Bennett*, 2 W. & W., L. 191; *Crawford v. M'Crac*, S.C.V. 3-5-64; *Mayor of Brunswick v. a'Beckett*, in Chambers, *Argus*, 7th and 12th June, 1860; *Fisher v. Wheatland*, 2 W. & W., L. 130. When damages were awarded to one of two adjoining land-owners—prohibition issued, as a question of title was involved, *Harker v. Eastwood*, S.C.V. 6-9-66; *Reg. v. Dowling*, 7-12-66; *R. v. Fawkner*, 21-11-69; and a County Court will also be prohibited if it proceeds to decide a question of title; *Lilley v. Harvey*, 17 L.J., Q.B. 357; *Owen v. Price*, 11 L.T. (N.S.) 273; *Gwynne v. Knight*, 17 L.J., Ex.

168; 12 Jur. 101; *Lloyd v. Jones*, 17 L.J., C.P. 206; *Batty v. Thompson*, 11 L.T. (N.S.) 103; *Kinnersley v. Orpe*, 2 Doug. 517; *Sinnisswood v. Pattison*, 15 L.J., C.P. 231; *Thompson v. Ingham*, 19 L.J., Q.B. 189; *ex parte Rayner*, 17 L.J., C.P. 16; *Reg. v. Evans*, 19 L.J. (M.C.) 151; *Cornwall v. Sanders*, 32 L.J. (M.C.) 6; *Hudson v. M'Rae*, 32 L.J. (M.C.) 65; 4 B. & S. 585; *R. v. Huntsworth*, 10 Jur. (N.S.) 945; 33 L.J. (M.C.) 131; *R. v. Cridland*, 27 L.J. (M.C.) 28; 7 E. & B. 853.

(*u*) *Robertson v. Bland*, A.R. 7 Dec. 1866.

(*v*) *Reeves v. Highett*, 1 V.R., L. 110; *Reeves v. Bonneau*, 1 A.J.R. 116.

(*w*) *Newman v. Mayor of Maryborough*, 4 W.W. & A'B., L. 153.

(*x*) *Defiance Co. v. Mayor of Craigie*, A.R. 3-12-66.

induced to disregard them in the hearing of a case. CH. II., § 11.  
 On the other hand, too great importance is sometimes attached to preliminary considerations that are merely directory. The rule to guide the justices in the absence of express authority, is, to use a popular phrase, the common-sense view of the question. "That which commends itself to the highest reason is the highest law," is a fundamental maxim, and therefore nothing shall be deemed to be law, except it commends itself to reason, unless where some statute directs to the contrary. In fictions of law there is always equity (*y*). While justices should in all cases give way to the provisions of a statute as interpreted by the rules of law, they should not allow fictions to interfere between the hearing of the case and a final decision, unless they are satisfied that those fictions are applicable to the point in issue (*z*). The laws are adapted to those cases which most frequently occur (*a*); and in their interpretation, he who sticks to the letter sticks to the bark, and cannot comprehend its meaning (*b*). Arguments founded upon inconvenience, should not be disregarded, and, where the weight of other reasoning is nearly on an equipoise, ought to turn the scale (*c*); indeed it has been held that common error, followed for a long time, had better be sanctioned by law, than serious injury be inflicted by disturbing it (*d*).

(11.) The multiplication of law suits is not favoured, and every reasonable effort should be made to decide the question at issue (*e*). Technical objections.

No person should be permitted to take advantage of No person should gain by his own wrong.

(*y*) 11 Co. 51.

(*b*) Co. Litt. 289.

(*z*) *Cessante ratione legis, cessat ipsa lex*, Co. Litt. 70.

(*c*) Co. Litt. 66.

(*d*) 4 Inst. 240.

(*a*) 2 Inst. 137.

(*e*) Co. Litt. 303.

CH. II., § 12. his own wrong (*f*), or to profit by anything that arises out of fraud (*g*). No lapse of time will make valid that which was bad in its inception (*h*), and when a wrong has been committed, the law will always supply a remedy (*i*). No wrong can be done by the king (*j*), nor by an act of the court (*k*), nor will the act of God be deemed prejudicial to any one (*l*).

Justices' equity.

(12.) The desire to administer equity instead of law has been alluded to, but it should never be forgotten that the only distinction between law and equity is in the remedy afforded. The paramount consideration of the public good always controls both law and equity. Sometimes one is imperfectly enabled to afford a substantial remedy, but that arises from the machinery of the court, not through any disregard of the fundamental principles of justice. It is erroneous to think that equity is more just than law. Equity supplies a means of enforcing law, when other means have been exhausted and have failed. Lord Cairns says "the difference between law and equity is not one of principle at all, but entirely one of judicature and procedure" (*m*).

(*f*) Co. Litt. 148 b.

(*g*) Cowp. 343.

(*h*) 4 Rep. 2.

(*i*) *Johnstone v. Sutton*, 1 T.R. 512; Co. Litt. 197 b.; *Entick v. Carrington*, 19 How. St. Tr. 1066.

(*j*) 2 Rolle's Ab. R. 304.

(*k*) Jenk. 118; 2 Inst. 287; 6 Rep. 68.

(*l*) *Keighley's case*, 10 Rep.

139; *Reg. v. Bamber*, 5 Q.B. 279.

An agreement to do either of two things, is not discharged when one becomes impossible by the act of God, *Barkworth v. Young*, 4 Drew, 1; 3 Jur. (N.S.) 34; 26 L.J. (Ch.) 153; *Appleby v. Myers* 14 W.R. 835; *Stewart v. Austin*, 3 W.W. and A'B. 112.

(*m*) 49 L.T. 3.

## CHAPTER III.

## ON THE INTERPRETATION OF STATUTES.

(13.) BEFORE proceeding to indicate the rules which the law provides for expounding and construing statutes, let us inquire into some of the special attributes of legislative enactments. As for instance, where a statute directs anything to be done, it impliedly provides the means for doing it (*a*), and indemnifies those who comply with its directions (*b*). Where a remedy is given, that remedy is exclusive, where the breach of duty complained of, arises out of that act (*c*), and if no remedy is given, the party injured has an action on the statute (*d*), and in addition to the private remedy, the person disobeying the statute may be indicted (*e*), if the disobedience concerns the public, but not in cases of mere private injuries (*f*). If a statute inflict a new punishment upon a person guilty of an offence before punishable at common law, the offence is still punishable as it was before the making of the statute (*g*), as it is a maxim of law that an affirmative statute, without any negative, expressed or implied, does not take away the common law (*h*). “The common law,” says *Wilmot*,

CH. III., § 13.  
The attributes  
of Statutes.

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|--|--|
| ( <i>a</i> ) 1 Inst. 233; 2 Inst. 222;                                   | Salk, 178; 1 Hawk. c. 22, s. 5.                  |
| 12 Rep. 130.   | ( <i>e</i> ) Cro. Eliz. 633.                     |
| ( <i>b</i> ) <i>Hepburn v. Mayor of Hawthorn</i> , 3 W.W. & A'B., L. 61. | ( <i>f</i> ) <i>Rex v. Parvlyn</i> , 2 Sid. 209; |
| ( <i>c</i> ) Cro. Jac. 64; Plow. 256.                                    | <i>R. v. Leginham</i> , 1 Mod. 71.               |
| ( <i>d</i> ) 2 Inst. 33; 10 Rep. 75; 6                                   | ( <i>g</i> ) <i>Rex v. Dixon</i> , 10 Mod. 337.  |
| Mod. 26; <i>Walwyn v. Smith</i> ,  | ( <i>h</i> ) 2 Inst. 200; 1 Inst. 111;           |
|  | Term Rep. 628.                                   |



CH. III., § 14, *C.J.*, "is nothing else but the statutes worn out by time;  
 15. all our law began by consent of the legislature, and whether it is now law by usage or writing, is the same thing." For many of these things that we now take for common law, were undoubtedly Acts of Parliament, though not now to be found on record (*i*).

Common law.  
 Statute law.

(14.) The lawyers make a distinction between statutes themselves—those made before the time of legal memory, viz., 1 Richard I., and those made since. The former are considered as part of the common law, the *leges non scriptæ*, for, notwithstanding that copies of them may be found, their provisions obtain at this day, not as Acts of Parliament, but by immemorial usage and custom. The latter are again divided; those from 1 Richard I. to Edward III. are called *antiqua statuta*, and all subsequent acts are called *nova statuta* (*j*). These distinctions it is desirable should be borne in mind when it is required to know what statutes of the Imperial Parliament are in force here. There can be no doubt that all prior to the 1 Richard I., as the common law, passed as soon as our flag indicated that England had occupied and settled this country. The statute law, however, passes, subject to certain limitations and qualifications which we shall hereafter consider (*k*).

*Antiqua  
 statuta.*

*Nova statuta.*

The Legisla-  
 ture.

(15.) The authority to make laws is vested here, as in England, with the Queen, acting upon the advice, and with the consent, of the two Houses of Parliament. The power exists in Victoria to make laws in all cases whatsoever, but the power is subject to the same limitations that exist in England. As for instance, if a statute be against common right or reason, or repug-

(*i*) 2 Wils. 348; Hale's Hist. of  
 Com. Law 68.

(*j*) Reeves' Hist. of England,  
 215.

(*k*) Post. p.



nant, or impossible to be performed, the common law shall control it, and adjudge it to be void (*l*). It has been held that a statute contrary to natural equity, as the making a man a judge in his own case, is void, for that "*jura naturæ sunt immutabilia*" (*m*). It must be clearly contrary to natural equity, for the judges will strain hard, rather than hold a statute to be void (*n*). Blackstone (*o*) says, "If it could be conceived possible for the Parliament to enact that a man should be a judge in his own cause, there is no court that has the power to defeat the intent of the Legislature, when couched in evident and express words, that leave no doubt that such was the intent of the Legislature."

CH. III., § 16,  
17.

(16.) A statute cannot make it lawful for A to commit adultery with the wife of B, for the law of God forbids it; but it may dissolve the marriage with B, and so render a marriage with A lawful (*p*). Though the principle is undeniably true, the application of it, and the conclusion, are most dangerous (*q*). Absolute power must reside somewhere, and to it implicit obedience must be paid. It can nowhere be so safely placed as in the hands of those who frame the laws, according to settled forms, and after mature deliberation; though the laws they establish may sometimes be pernicious, opposed to morality, and, as we collect it, to the divine will. As measured by the law of God, which must be the ultimate test, human laws may be unjust, but they will still be obligatory (*r*).

Inoperative  
Statutes.

(17.) The laws of a colony cannot extend beyond its territorial limits (*s*).

Territorial  
limits of  
Statutes.

- |   |   |
|---|---|
| ( <i>l</i> ) <i>Bonham's case</i> , 8 Rep. 118; | <i>Wood</i> , 12 Mod. 688.                  |
| 2 Inst. 527; Finch 74.                          | ( <i>q</i> ) Wordison's Lect. Elements      |
| ( <i>m</i> ) Hob. 87; 8 Rep. 118.               | of Jurisprudence, 36.                       |
| ( <i>n</i> ) 10 Mod. 115; 11 Co. 63.            | ( <i>r</i> ) Dwar. 483.                     |
| ( <i>o</i> ) 1 Comm. 91.                        | ( <i>s</i> ) <i>Craw v. Ramsey</i> , Vaugh. |
| ( <i>p</i> ) <i>The City of London v.</i>       | 274.  |

CH. III., § 18.

Interpreta-  
tion.  
Affirmative  
and Negative  
Statutes.

(18.) In the construction of statutes, some are affirmative, others negative. The terms of the Act will readily indicate to which class it belongs. An affirmative statute does not take away the common law (*t*), nor repeal a precedent affirmative statute (*u*), unless the latter be contrary to the former (*v*); and so the rule has been laid down that affirmative words are not exclusive, and do not, without a corresponding prohibition, prevent the doing of the thing in a way previously lawful (*w*). Where a new power is given by an affirmative statute to a certain person, although it be an affirmative statute, all other persons are excluded from the exercise of the power (*x*). As where appeals against assessment by a shire council must go to the *nearest* Court of Petty Sessions (*y*), or where authority was conferred upon the County Court, it was held it could not be exercised by the judge thereof. But the designation of a certain person to whom a new power is given by an affirmative statute, does not exclude another person who was by a precedent statute authorised to do it, from doing the same thing (*z*). A negative statute, however, so binds the common law, that a man cannot afterwards make use thereof (*a*), neither can prescription or custom avail against a negative statute (*b*).

(*t*) 1 Inst. 111; 2 Inst. 200.

(*u*) 11 Rep. 61.

(*v*) 1 Ld. Raymd. 160; *Lang v. Spicer*, 1 M. & W. 135; *Dakins v. Seaman*, 9 M. & W. 789; *Pilkington v. Cooke*, 15 M. & W. 657.

(*w*) *R. v. Justices of Leicester*, 7 B. & C. 6.

(*x*) *Wardens of St. Paul's v. the Dean*, 4 Price Rep. 65; *Foster's case*, 11 Rep. 56; *In re Robertson ex parte the Campaspe*

*Road Board*, S.C.V. *Argus* 28-11-65; *Stradling v. Morgan*, Plow. 206.

(*y*) *R. v. McLachlan*, 3 W.W. & A'B., L. 120.

(*z*) *Davis v. Edmonson*, 3 B. & P. 387, and *Foster's case*, 11 Rep. 56.

(*a*) Bro. Parl. pl. 72.

(*b*) *Ld. Lovelace's case*, W. Jones, 271; *Jones v. Smith*, 2 Buls. 36.

(19.) The power of construing statutes, is in the CH. III., § 19-  
judges of the temporal courts. If, in a proceeding 21.  
before an inferior court, confessedly within its juris- Judges  
diction, an Act of Parliament be misinterpreted by it, construe  
the further proceedings will be prohibited (c). Statutes.

(20.) The rules to be observed in construing statutes Rules of  
will now be considered, and the first and most natural construction.  
way of construing a statute is to construe one part by  
another part of the same statute (d). If any part be  
obscure, it is proper to consider other parts (e), and a  
statute should be so construed that, if it can be pre-  
vented, no clause, sentence, or word shall be super-  
fluous, void, or insignificant (f); though when words in  
a clause are repeated and may be dispensed with,  
without altering the sense of the clause, they may be  
excluded as surplusage, and this holds good in a penal  
statute (g).

(21.) The title is no part of the Act (h), and although Title.  
the preamble, as a general rule, is a key to the con-  
struction of the Act (i), it cannot control or limit the  
enacting clauses (j). Indeed some recitals in preambles  
have been positively mischievous, as for instance when  
it is stated that "doubts have arisen at common law,"  
which frequently never existed. Such preambles have  
much weakened the force of the common law in several  
instances (k).

(c) *Gould v. Gapper*, 5 East.  
345.

(d) 1 Inst. 381.

(e) *Stowell v. Zouch*, Plow. 365;  
11 Mod. 161.

(f) *Rex v. Berchett*, 1 Show.  
108; Hard. 344.

(g) *Reg. v. Draper*, 1 A.J.R.  
94.

(h) Hard., 324; Ld. Raym., 77;  
7 East, 152.

(i) 1 Inst., 79; *Stowell v. Zouch*,  
Plow., 369.

(j) *Rex v. Athos*, 8 Mod., 144;  
7 B. & C., 660; 2 Atk., 205; 1  
Atk., 174.

(k) Barrington Obs. on Statutes,  
394.

CH. III., § 22-24. General words. (22.) General words in one clause, may be restrained by particular words in a subsequent clause of the same Act (*l*). But if a particular thing be given or limited in the preceding part of a statute, this shall not be taken away or altered by any subsequent general words in the same Act (*m*). The general enacting words are not to be restrained by words introductory to the enacting words, as when clauses in an Act begin with a preamble or a recital (*n*).

Saving clause. (23.) The purview of a statute may be qualified or restrained by a "saving clause," but if the saving be repugnant to the purview it is void (*o*). Not so a "proviso," for if that be directly contrary to the purview, the proviso is good, and not the purview, because it speaks the later intention of the Legislature (*p*). As one chapter in a statute may be both general and particular, because one chapter may contain divers acts and laws which may be as several in their natures as if they were in several chapters, so by parity of reason, where there are different provisions for different purposes, and penned in different words, in the same chapter, they ought to be so construed to avoid inconsistency, as if they had been in different chapters (*q*).

Acts *in pari materia* to be construed together. (24.) If divers statutes relate to the same thing, they ought all to be taken into consideration in construing

(*l*) *Rex v. Archbishop of Armagh*, 8 Mod., 8.

(*m*) *Standon v. University of Oxford*, 1 W. Jon., 26.

(*n*) *Walker v. Richardson*. 2 M. & W. 889; *Whitmore v. Robinson*, 8 M. & W. 472; *Hall v. Franklin*, 3 M. & W. 272.

(*o*) A saving in a statute is only an exemption of a special

thing out of the general things, mentioned therein. *Halliswell v. Corporation of Bridgewater*, 2 And., 192. For an example see No. 160, sec. 1. *Alton Woods case*, 1 Rep., 47; Plow, 565; 10 Mod., 115.

(*p*) *Attorney-General v. Chelsea Water Works Co.*, Fitz., 195.

(*q*) Hob, 226; Parker, 13, 14.

any one of them. They are to be taken, at least those CH. III., § 25, 26.  
*in pari materiâ*, as if they were one law (r).

If it can be gathered from a subsequent statute *in pari materiâ*, what meaning the Legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and govern it (s).

(25.) The common law ought to be regarded in the Common Law to be regarded.  
 construction of a statute. To know what the common law was before the making of an Act, whereby it may be known whether the statute be introductory of a new law, or only affirmatory of the common law, is the very lock and key to set open the windows of a statute (t). If a statute make use of a word well known at common law, it will be so interpreted (u); and when the words of an Act are general, it is subject to the control and order of the common law (v). Statutes will not be presumed to make any alteration in the common law, otherwise than the Act expressly declares (w), and where a new remedy is given by statute in a particular case, this shall not be extended to alter the common law in any other than that instance, except in cases of public utility (x).

(26.) The intention of the makers of a statute, ought Intention of the Legislature.  
 to be regarded in its construction, and may be collected from the cause or necessity of making the law (y).

(r) 1 Doug., 30; 2 T.R., 387;  
*Newman v. Mayor, &c., of Mary-*  
*borough*, 4 W.W. & A'B., 153.

(s) *Morris v. Mellin*, 6 B. & C.,  
 454, & 7 B. & C., 99; *R. v.*  
*Bowness (Inhabitants)*, 4 M. &  
 S. 210.

(t) *Stowell v. Zouch*, Plow.  
 360; 2 Inst. 301; 3 Rep. 13.

(u) *Smith v. Harmon*, 6 Mod.  
 143.

(v) *R. v. Bishop of London*, 1  
 Show. 455; Sav. 39.

(w) 11 Mod. 130.

(x) *Forster's case*, 11 Rep. 59;  
 Hob. 298; Carth. 36; Vaugh. 179.

(y) *Willion v. Berkley*, Plow.  
 252, and *Eyston v. Studd*, Plow.



CH. III., § 27. And so where it is manifestly the intention of the Legislature that a subsequent Act of Parliament shall not control the provisions of a former Act, the subsequent Act shall not have such operation, even though the words of it, taken strictly and grammatically, would repeal the former Act (*z*).

Implied  
construction.

27. In some cases, the letter of an Act is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter (*a*). As if a law enact that "whoever does a certain act shall be adjudged a felon, and suffer death." Now, if a madman do this, he shall be excused; for as the action is not imputed to him, but to an involuntary ignorance, to which the law imputes the act, brought upon him by the hand of God, he is not within the law. But this exemption does not apply to drunkenness, because the drunkard brought his ignorance upon himself, and he might have avoided it (*b*). Actions done *ex ignorantia* are sometimes excused where knowledge was impossible, as where a prisoner was indicted for shooting A. B. on the high seas, and the offence was committed within a few weeks of the passing of the 39 Geo. III., c. 37, which enabled the prisoner to be tried on land, and before he could have knowledge of the passing of the Act. The judges thought as he could not have been tried, but for that Act, and as he *could not* have known of it, he ought to be pardoned (*c*). A statute which takes away a remedy given by the common law, ought never to have an equitable construction—that is, to extend its meaning (*d*).

464; Lit. Rep. 212; 11 Mod.  
161.

(*z*) 7 Bac., Ab. 458.

(*a*) *Fulmerston v. Steward*,  
Plow. 109. 3 Rep. 7. Hob. 346;  
and *Reniger v Fogossa*, Plow. 13.  
Plow. 465.

(*b*) *Reniger v. Fogossa*, Plow.  
19.

(*c*) *Rex v. Bailey*, R. & R. 1.

(*d*) *Hammond v. Webb*, 10  
Mod. 282.



The remedy given by the 9 Ed. III. c. 3, against CH. III., § 28, executors, has been always extended by equitable construction to administrators, because they are within the equity of the statute (*e*).

(28.) A statute which concerns the public good ought to be construed liberally. Although the Crown is not bound by any statute, unless expressly named therein, it has been held that the Crown is bound by the general words of a statute made for the maintenance of religion, the advancement of learning, or the support of the poor; because all statutes in which the public are concerned, ought to be construed that they may be effectual (*f*). But when a statute gives away the property of a subject, as an Act discharging insolvent debtors, it ought to be construed strictly (*g*); also penal statutes (*h*) and those which give costs, for they are in the nature of a penalty (*i*). In a late case, however, it was held that costs were given as an indemnity (*j*). A statute giving a new remedy ought to be construed liberally (*k*); while one creating a new jurisdiction should be construed strictly (*l*). Public Statutes.

(29.) It is a very useful rule in the construction of statutes, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless at variance with the intention of the Legislature, to be collected from the statute itself, or leading to any Grammatical construction.

(*e*) *Eyston v. Studd*, Plow. 467.

(*f*) *Magdalen College Case*, 11 Rep. 70; *Ballarat v. Bungaree Rd. Bd.*, 1 A.J.R. 49; *Pierce v. Hopper*, Str. 253.

(*g*) *Calladay v. Pilkington*, 12 Mod. 513.

(*h*) *Reniger v. Fygossa*, Plow. 17, 2 Inst. 468.

(*i*) *Cone v. Bowles*, Salk. 205; *Reg. v. Inhabitants of Glastonby*, Rep. temp. Hard. 357.

(*j*) *Harold v. Smith*, 29 L.J., Ex. 141; *R. v. Panton*, 1 A.J.R. 37.

(*k*) *Pool v. Neil*, 2 Sid. 63.

(*l*) *Pierce v. Hopper*, Str. 258. 10 Rep. 75; *Warwick v. White*, Bunb. 106.

CH. III., § 30, manifest absurdity or repugnance, in which case the  
 31. language be may varied or modified, so as to avoid such inconvenience, but no further (*m*); or unless a uniform series of decisions have established a particular construction (*n*), or that such first-mentioned construction would defeat antecedent vested rights (*o*).

Repealed  
 Acts.

(30.) When an Act is repealed, the law is as if it had never passed, except as to transactions completed under it (*p*). This led to the doctrine, "that when a law repealing another law was itself repealed, it revived the former law." In this colony that principle does not hold good, as by the statute prescribing rules for the interpretation of legislative enactments, it is provided that such repeal shall not revive the former law (*q*).

Statutes con-  
 ferring rights.

(31.) Rights given by a temporary statute may continue even after the statute has expired (*r*). When an Act was repealed, pending an action, a plea under it was ignored (*s*). The principle adopted by Lord Tenterden, that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and, it is to be hoped, will always remain so (*t*). When, however, a statute

(*m*) *Becke v. Smith*, 2 M. & W. 195.

(*n*) *Doe d. Ellis v. Owen*, 10 M. & W. 521; *Hughes v. Buckland*, 15 M. & W. 355.

(*o*) *Edmunds v. Lawley*, 6 M. & W. 289; *Stracey v. Nelson*, 12 M. & W. 535.

(*p*) *Steavenson v. Oliver*, 8 M. & W. 241; *Simpson v. Ready*, 11 M. & W. 346, and 12 M. & W. 736.

(*q*) Act No. 22, sec. 7, 2 V.S. 191.

(*r*) *Steavenson v. Oliver*, 8 M. & W. 241.

(*s*) *Warne v. Beresford*, 2 M. & W. 848; *Shaw v. Costerfield Co.*, 1 V.R., M. 7; *Charrington v. Meatheringham*, 2 M. & W. 228.

(*t*) *Henderson v. Sherbourne*, 2 M. & W. 239.

imposes a penalty upon "every person" engaged in an offence, joint offenders (*e.g.*, partners) are each liable to that penalty (*u*). CH. III., § 32,  
33.  
Penalties.

(32.) There is a well-known distinction in the law, as to exceptions in the purview of the Act, and in a proviso. If there be an exception in the enacting clause, it must be negatived in pleading; but if there be a separate proviso, it need not (*v*). Lord Mansfield says:—"What comes by way of proviso in a statute, must be insisted upon by way of defence by the party accused," if he desires to bring himself within its protection; "but when exceptions are in the enacting part of a law, it must appear in the charge, that the defendant does not fall within any of them" (*w*). *In pleading* a statute, the whole of its title must be stated, though it comprise several other matters besides that to which the pleading relates (*x*). Exceptions  
and provisos.

When the schedule is inconsistent with the Act, the schedule is overruled (*y*); and when general words follow particular words, the general words shall be construed *ejusdem generis* with the particular words (*z*). Schedule.

(33.) The law will not favour a repeal by implication, unless the repugnance be quite plain; and such repeal carrying with it a reflection on the wisdom of Repeal by  
implication.

(*u*) *R. v. Dean*, 12 M. & W. 43.

(*v*) *Steel v. Smith*, 1 B. & A. 98; *Simpson v. Reedy*, 12 M. & W. 736; 13 L.J., Ex. 193; *Mayor of Salford v. Ackers*, 16 M. & W. 81; 16 L.J., Ex. 6; *Sanders' Case*, 1 Wms. Saund. 262; *Tolman v. Portbury*, 22 L.T. (N. S.) 33.

(*w*.) 1 East 644 n.; Burr. 148; 1 East P.C. 167.

(*x*) *Beck v. Beverly*, 11 M & W. 845; *Nixon v. Nanney*, 1 Q.B. 747.

(*y*) *Jamieson v. Allen*, 1 W. & W., Eq., 19; *Reg. v. Baines*, 12 A. & E. 227.

(*z*) *Sandiman v. Breach*, 7 B. & C. 96; 6 A. & E. 729, 734. *Fenton v. Skinner*, 1 W. & W. 65; *Sutton v. Parker*, N.C. 15.

CH. III., § 34, former Parliaments, it has ever been confined to repeal-  
 35. ing as little as possible of the preceding statute (a).

Words.

(34.) Where the same words are used in different parts of a statute, they will be taken to have been used everywhere in the same sense; and words and phrases, the meaning of which in a statute have been ascertained, are, when used in a subsequent statute, to be understood in the same sense, subject to the qualification, in Acts of Parliament, as in the case of a will, that the court may put a different construction upon the same words when applied to a different subject-matter (b).

*Casus omissus.* A *casus omissus* can in no case be supplied by a court of law, for that would be to make laws. Judges are bound to take the Act of Parliament as the Legislature made it (c).

Though used in their plain and ordinary sense, general words may be limited by the relative word "such," to a particular description of thing contained in a preceding section (d).

Interpreta-  
 tion Act.

(35.) We shall proceed now to give the interpretation which either the Legislature or the Judges have given to particular words and phrases.

Governor.  
 Governor-in-  
 Council.

"The Governor" means the person administering the government; and the "Governor-in-Council," the Governor acting with the advice of the Executive Council.

(a) 11 Rep. 63 ; Dyer 347 ; 15 East 377 ; "The Indian," 33 L.J. (Ad.) 195.

(b) 1 P. Wms. 667 ; *Firth v Chapman*, 3 Atk. 382 ; see also *Ballarat, Mayor, v. Bungaree Rd. Bd.*, 1 A.J.R. 33 ; Bac. Ab. tit., Statute I.

(c) 1 T. R. 52 ; *Adair v. Simpson*, 1 W.W. & A'B. 13.

(d) *R. v. Inhabitants of Givenop*, 3 T.R. 135 ; *R. v Marks*, 3 East 160 ; 2 Inst. 11 ; 11 Rep. 330.

Unless the contrary is expressly provided, words importing the masculine gender will include the feminine, the singular will include the plural, and the plural the singular. CH. III., § 35.  
Gender.

The word "month" means a calendar month. Month.  
 "Land" includes messuages, tenements, and hereditaments, houses, and buildings, unless when there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular nature. Land.

"Oath," and "swear," and "affidavit," include affirmation, declaration, affirming, and declaring, in the case of persons by law allowed to declare or affirm, instead of swearing. Oath.

"Her Majesty" includes her heirs and successors (*e*). Her Majesty.

"Law officer" means the Attorney-General or Solicitor-General, and in some cases the Minister of Justice (*f*). Law officer.

"Justice" means justice of the peace. Justice.

"Person" includes a corporation, unless there be something repugnant or inconsistent with such interpretation (*g*). Person.

"Ability," under 9 Geo. IV. c. 14, means the ability of a third person effectually to perform and satisfy the engagement of a *pecuniary* nature, into which he has proposed to enter (*h*). Ability.

"Acceptance in satisfaction" must be an act of the will in the party receiving (*i*). Acceptance in satisfaction.

"Accepting no responsibility" stipulation, does not exempt a company from liability for a loss arising wholly from their own negligence (*j*). Accepting no responsibility.

(*e*) Act No. 22, sec. 6; 2 V.S. 193. 123, per Abinger, C.B., and see S.C., per Alderson, B., p. 108.

(*f*) Acts Nos. 358 and 359, sec. 2. (*i*) *Johnson v. Macdonald*, 9 M. & W. 600, per Alderson, B.

(*g*) Act No. 22, sec. 6; 2 V.S. 193. (*j*) *Martin v. Great Indian Peninsular Railway Co.*, L.R.,

(*h*) *Lyde v. Barnard*, 1 M. & W. 3 Ex. 9.



CH. III., § 35.	"Account stated" must be a statement of some certain amount of money due, which must be made either to the party himself or to some agent of his ( <i>k</i> ).
Account stated.	
Action for the recovery of any debt.	"Action for the recovery of any debt" applies to judgments recovered in actions of debt on contracts, but not to those in actions of tort ( <i>l</i> ).
Admitted set-off.	"Admitted set-off" means a set-off before action brought ( <i>m</i> ).
After fact committed.	"After the fact committed," is equivalent to "after the cause of action;" and in case of trespass to goods, the fact is not merely the seizure, but the sale also ( <i>n</i> ).
Against the form of the Statute.	"Against the form of the statute," is not a sufficient allegation that a contract is illegal, but means that it is against the form of <i>some</i> statute ( <i>o</i> ).
Aggrieved.	"Aggrieved," under 5 & 6 Vic. c. 45, applies only to those whose title conflicts with a plaintiff's ( <i>p</i> ).
Amalgamation.	"Amalgamation," powers of, and to transfer business of a company, do not empower directors, even with consent of an extraordinary general meeting, to compel a dissentient shareholder to become a member in a new company ( <i>q</i> ).
At the time of making.	"At the time of the making," means the same instant of the making ( <i>r</i> ).
And—Or.	"And," not read as "or" ( <i>s</i> ).
Assets.	"Assets." All goods and chattels, actions, and commodities, which were of the deceased, in right of action or possession, as his own, and so continued to the time

(*k*) *Hughes v. Thorpe*, 5 M. & W. 667, per Parke, B.

(*l*) *Thomas v. Hudson*, 14 M. & W. 373.

(*m*) *Walesby v. Goulston*, L. R., 1 C. P. 567.

(*n*) *Collins v. Rose*, 5 M. & W. 202, per Parke, B.

(*o*) *Turquand v. Mosdon*, 7 M. & W. 510.

(*p*) *Chappell v. Purday*, 12 M. & W. 307, per Parke, B.

(*q*) *Re Empire Assurance Co.*, *ex parte Bagshaw*, L. R. 4 Eq. 341.

(*r*) Plow 188.

(*s*) *Re Sanders' Trusts*, L. R. 1 Eq. 675.



of his death, and which after his death pass into the CH. III., § 35. hands of the executor (*t*).

"At" and "from," in a homeward policy, are to be At—From. construed in their natural and geographical sense, without reference to the expiration of an outward policy "to" the same place (*u*).

"At the time of," under 53 Geo. III. c. 159, is <sup>At the time of.</sup> equivalent to "immediately before" (*v*).

"Beer-shop." The sale of beer by retail under a Beer-shop. license "not to be drunk on the premises," was held to be no breach of a covenant not to use a house as a "public-house for the sale of beer, &c." (*w*).

"Beneficial," and "profitable," are not convertible Beneficial. terms (*x*).

"Boats, vessels, and other craft," held to include Boats, &c. steamboats (*y*).

"Conviction" taken for attainted, and to extend to a Conviction. judgment on demurrer (*z*).

"Creditor," under the Bankruptcy Acts, applies only Creditor. to those who are such at the time of the bankruptcy (*a*).

"Credible witness" means disinterested person (*b*). <sup>Credible Witness.</sup>

"Demised" means left to another, or granted over to Demised. another, whether by act in deed, or by act in law (*c*).

"Detain," in *detinue*, means that the goods are Detain. withheld, and the owner prevented from getting possession (*d*).

(*t*) *Smedley v. Philpot*, 3 M. & W. 579.

(*u*) *Haughton v. Empire Marine Insurance Co.*, L.R., 1 Ex. 206.

(*v*) *Brown v. Wilkinson*, 15 M. & W. 391.

(*w*) *Pease v. Coats*, L.R., 2 Eq. 688.

(*x*) *Governors of Boston Poor v. Waite*, 5 A. & E. 8.

(*y*) *Tisdell v. Combe*, 7 A. & E. 788.

(*z*) *Foster's Case*, 11 Rep. 59.

(*a*) *In re Poland*, L.R., 1 Ch. 356; *re John Walker*, 3 A.J.R. 55.

(*b*) *White v. Barrack*, 1 M. & W. 424.

(*c*) *Plow* 103.

(*d*) *Clements v. Flight*, 16 M. & W. 42.

CH. III., § 35.	"Dwelling-house" comprises a house divided into several chambers, with separate outer doors ( <i>e</i> ).
Dwelling-house.	"Desertion" held to commence, not when cohabitation ceased but, when the husband determined to abandon the wife and live with another woman ( <i>f</i> ).
Desertion.	"Entertainment of the stage." See <i>Wigan v. Strange</i> ( <i>g</i> ).
Entertainment.	"Effects," in a will, not extended beyond personal property, but it <i>may</i> be used so as to extend to pass real property ( <i>h</i> ).
Effects.	"Empowered" is imperative where the authority emanates from a superior. In case of a public duty, such words compel the exercise of the power ( <i>i</i> ).
Empowered.	"Falsely" means by false evidence, or by means of falsehood ( <i>j</i> ).
Falsely.	"Fixtures." See <i>Birch v. Dawson</i> ( <i>k</i> ). Not necessarily to be taken to mean things affixed to the freehold ( <i>l</i> ).
Fixtures.	"Forthwith" excludes intervention of delay ( <i>m</i> ).
Forthwith.	"Goods, wares, and merchandise." Shares in a joint-stock banking company are not such, within sec. 17 of the Statute of Frauds ( <i>n</i> ).
Goods.	"Into and out of." See " <i>The Maria</i> " ( <i>o</i> ).
Into—Out of.	"In pursuance of this Act." See <i>R. v. Bristol and Exeter Railway Company</i> ( <i>p</i> ).
In pursuance of.	"Interruption," an obstruction to the exercise of a right, not to a person ( <i>q</i> ).
Interruption.	

(*e*) *Monks v. Dykes*, 4 M. & W., 569, per Parke, B.

(*f*) *Gatehouse v. Gatehouse*, L.R., 1 P. & M. 489.

(*g*) L.R., 1 C.P. 175.

(*h*) *Doe d. Hair v. Earles*, 15 M. & W. 457.

(*i*) 5 T.R. 538 ; 7 A. & E. 925, *R. v. St. Saviour's, Southwark*.

(*j*) *Daniels v. Fielding*, 16 M. & W. 208, per Rolfe, B.

(*k*) 2 A. & E. 37.

(*l*) *Sheen v. Richie*, 5 M. & W., 175.

(*m*) *R. v. Robinson*, 3 A. & E. 284 ; 12 A. & E. 672.

(*n*) *Humble v. Mitchell*, 11 A. & E. 205.

(*o*) 1 A. & E. 358.

(*p*) 11 A. & E. 194.

(*q*) *Flight v. Thomas*, 11 A. & E. 701.

"It is proposed," indicates something in contemplation (*r*). CH. III., § 35.

"Likewise, and in like manner," carry on the sense, and extend the operation, of a clause or section, by reference to a former clause or section (*s*). It is proposed.  
Likewise.  
Like manner.

"Lands liable to rate." These words may extend to navigations, cuts, and canals, as well as to quays or wharfs (*t*), even if land is covered with water (*u*). Lands liable to rate.

"Manufacture." What is a new manufacture (*v*). Manufacture.

"Minerals" held to include freestone, but only when obtained by underground mining, and not by working in an open quarry (*w*). Minerals.

"Mining Royalty," not an interest in land under the Mortmain Act (*x*). Mining Royalty.

"Merchandise." Stone not liable to duty upon merchandise (*y*). Merchandise.

"Non-cultivation" will not let in evidence of bad cultivation (*z*). Non-cultivation.

"Necessaries." Things without which an individual cannot reasonably exist, such as food, raiment, lodging, &c. (*a*). Necessaries.

"Office." See *Shaw v. Morley* (*b*). Office.

"Occupy." See *R. v. Great Bently* (*c*) and *R. v. Inhabitants of St. Mary Kalendar* (*d*). Occupy.

"Or" is not always disjunctive. It is sometimes interpretative of the former word (*e*).

(*r*) *R. v. Brownlow*, 11 A. & E. 219. (*y*) *Fisher v. Lee*, 12 A. & E. 522.

(*s*) Stat. of Glos., c. 2.

(*z*) *Lacen v. Hooper*, 6 T.R. 224.

(*t*) *R. v. Leeds and Liverpool Canal Co.*, 7 A. & E. 685.

(*a*) *Chapple v. Cooper*, 13 M. & W. 258.

(*u*) *Regent's Canal Co.*, 6 B. & C. 720.

(*b*) L.R., 3 Ex. 137

(*v*) *Crane v. Price*, 4 M. & G. 603.

(*c*) 10 B. & C. 520.

(*w*) *Bell v. Wilson*, L.R., 1 Ch. 303.

(*d*) 9 A. & E. 682.

(*e*) *In re Merrick's Trusts*, L.R., 1 Eq. 551.

(*x*) *Brook v. Badley*, L.R., 4 Eq. 106.

CH. III., § 35.	"Other than" ( <i>f</i> ).
Other than.	"Other persons." Persons of the same description as
Other persons.	those previously enumerated.
Personal actions.	"Personal actions." See <i>Attorney-General v. Lord Churchill</i> ( <i>g</i> ).
Proper officer.	"Proper officer of the Council," in Act No. 359, means any officer or person duly charged by the Council in that behalf.
Public dancing-house.	"Public dancing-house." See <i>Marks v. Benjamin</i> ( <i>h</i> ).
Public Act.	"Public, local, and personal Act." See <i>Cock v. Gent</i> ( <i>i</i> ).
Preferred.	"Preferred." Before which the indictment is preferred—held to mean not only the court before which the bill is found, but that also to which it is removed ( <i>j</i> ).
Ready and willing.	"Ready and willing" imply both disposition and capacity to do the act ( <i>k</i> ).
Rubbish.	"Rubbish." Such things as are so in the contemplation of the owner ( <i>l</i> ).
Seal of the court.	"Seal of the Court." When the seal purports to be that of the Court, the Judges notice it as such, and proof of the seal is not necessary ( <i>m</i> ).
Second offence.	"Second offence." The indictment must recite the record of the first conviction, and upon the evidence the record must be proved ( <i>n</i> ).
Satisfaction to creditor.	"Satisfaction to creditor," under the Insolvent Act, means pecuniary satisfaction ( <i>o</i> ).
Subject to the laws.	"Subject to the laws and statutes now in force." See <i>R. v. Churchwardens of St. James's, Westminster</i> ( <i>p</i> ).

(*f*) Plowd. 195.(*g*) 8 M. & W. 192.(*h*) 5 M. & W. 568.(*i*) 12 M. & W. 234.(*j*) *R. v. Pembroke*, 7 Dowl. 1 ;  
2 M. & Rob.(*k*) *De Medina v. Norman*, 9  
M. & W. 827.(*l*) *Filbey v. Combe*, 2 M. & W.,  
683.(*m*) *Doe dem. Duncan v. Ed-*  
*wards*, 9 A. & E. 554.(*n*) 1 Hale, P.C. 686.(*o*) *Kitching v. Croft*, 12 A. &

E. 586.

(*p*) 5 A. & E. 399.

"Shall and lawfully may." These words are obligatory, and ought to have such construction, unless it would lead to some absurd consequence (*q*). CH. III., § 35.  
Shall and lawfully may.

"Survive and survivor" import that the person who is to survive, must be living at the time of the event which he is to survive (*r*). Survive and survivor.

"Thereupon and thereby." See *Atkinson v. Raleigh* Thereupon. (*s*).

"Towards and unto." See *R. v. Marchioness of Downshire* (*t*). Towards—  
Unto.

"Term," in a lease, only designates the time from which it is to run, by way of calculation, not as conveying any interest (*u*). Term.

"Undertaking." The word is ambiguous; it may mean the speculation, or might be taken to include the land itself (*v*). Undertaking.

"Unmarried," in a will, means "never having been married" (*w*).

"Unmarried," by the Legislature, 3 & 4 W. & M. c. 11, sec. 37, "not married at the time" (*w w*).

"Upon," mostly used for upon condition of, sometimes used for after, within a reasonable time (*x*). Upon.

"Upon," construed, upon the occasion of, or "at the time of" (*y*).

"Void," incapable of being ratified (*z*). Void.

"Vested," construed to mean indefeasible (*a*). Vested.

"With," taken to mean "and as incident thereto" (*b*). With.

(*q*) *Steward v. Greaves*, 10 M. & W. 719.

(*r*) *Gee v. Liddell*, L.R., 2 Eq. 341.

(*s*) 4 Q.B. 79.

(*t*) 5 A. & E. 232.

(*u*) *Cooper v. Robinson*, 10 M. & W. 696.

(*v*) *Doe dem. Myatt v. St. Helen's Railway Company*, 2 Q.B. 374.

(*w*) *Maberly v. Strode*, 3 Ves. 450, per Ld. Alvanley.

(*w w*) *Bott's Poor Law*.

(*x*) Dwar. 692.

(*y*) *R. v. Humphrey*, 10 A. & E. 335.

(*z*) *Williams v. Moor*, 11 M. & W. 264.

(*a*) *In re Edmonson's Estate*, L.R., 5 Eq. 389.

(*b*) *Durham Railway Company v. Walker*, 2 Q.B. 966.

CH. III., § 35.	"Warranty."	An express or implied statement of something which the party undertakes shall be part of a contract, and yet be collateral to the express object of it (c).
Warranty.		
Wilfully.	"Wilfully"	restricted to first branch of a clause only (d).
Wilful and Malicious.	"Wilful and malicious"	import <i>personal</i> malice and ill-will, as distinguished from the malice in law essential to sustain an action for libel (e).
What is left.	"What is left,"	in a will, held sufficient to carry the residue (f).

(c) *Chanter v. Hopkins*, 14 M. & W. 404, per Ld. Abinger, C.B.

(e) *Foster v. Painter*, 8 M. & W. 395.

(d) *Hutchinson v. Manchester Railway Company*, 15 M. & W. 314.

(f) *In re Hindmarch*, L.R., 1 P. & M. 307.



## CHAPTER IV.

### EVIDENCE.

(36.) To deal effectually with the question of evidence, CH. IV., § 36, would require the space of several volumes, each 37. larger than the present work. Nothing more, therefore, than a mere outline of the principal rules of evidence, will be attempted. Outline of evidence.

(37.) It has been affirmed that no material difference exists in regard to the rules of evidence in criminal, and civil, procedure (*a*); that what may be received in the one case, may be received in the other; and what is rejected in the one case, is rejected in the other. A fact must be established by the same evidence, whether it is to be followed by a criminal, or civil consequence (*b*). In either mode of procedure, the following rules should be adhered to:—

1. The proofs adduced must be relevant to the issue.
2. The best evidence which the nature of the case will admit of, must be given.
3. Secondary evidence will only be received when the best and most direct evidence cannot be had; and there are no degrees in secondary evidence.
4. That hearsay evidence is not in general admissible as evidence, because the individual,

(*a*) Per Best, J., *R. v. Burdett*,  
4 B. & A. 122.

(*b*) Per Lord Erskine, C. 29  
How. St. Tr. 764.

## CH. IV., § 37.

whose words are spoken to, was not sworn, nor can he be submitted to cross-examination.

5. That entries made by a person since deceased, when against his own interest (*c*), or made in the usual course of business, may be received.

6. That the construction of a written document, is matter of law, and rests with the court.

These rules apply to criminal, as well as civil, courts.

The following, however, more frequently present themselves to notice in criminal proceedings:—

1. The law always presumes in favour of innocence.
2. The evidence of accomplices must be regarded with suspicion.
3. Confessions, whether judicial or extra-judicial (*i.e.*, whether made before a magistrate or in court, and in due course of legal proceedings; or made elsewhere, and under other circumstances), are admissible, provided they were *voluntarily* made; and if admissible, they must be received in their entirety (*d.*)

(*c*) *R. v. Overseers of Birmingham*, 1 B. & S. 763, and cases there cited.

(*d*) “By the law of England,” says Parke B. in *Reg. v. Baldry*, 2 Den., C.C. 444, “in order to render a confession admissible in evidence, it must be perfectly voluntary; and there is no doubt that any inducement, in the nature of a promise or of a threat, held out by a person in authority, vitiates a confession;” and *per* Pollock, C.B., *ibid.* 442

—“It would not be safe to receive a statement made under any influence or fear.” It is for the Judge to determine whether a confession is evidence or not, and the *onus* of proving that it was *not* made under a threat or an inducement, lies upon the prosecution; and if this point is left doubtful, it will be rejected. *R. v. Warringham*, 2 Den., C.C. 447 (n). As to who is “a person in authority,” see *R. v. Moore*, 21 L.J., M.C. 199; 2 Den., C.C.

4. A dying declaration may be received in evidence CH. IV., § 37.  
 on a trial for homicide, when the death of  
 the deceased is the subject of the charge,  
 and the circumstances which were the  
 cause of the death, are the subject of the  
 dying declaration (e).

522; *R. v. Sleeman*, 23 L.J. M.C. 19; *Dearsley*, 249; *R. v. Luckhurst*, *ibid* 245; 23 L.J. M.C. 18; *R. v. Laughner*, 2 C. & K., 225. It must be a person who presumably has the power to forgive. As where a maid-servant was indicted for infanticide, a confession elicited by her mistress was held admissible. If the inducement is made in the presence of a person in authority, such as a prosecutor, or one who is likely to be a prosecutor, who stands by and does not object, his silence is treated as a tacit acquiescence in the inducement, and the confession will be rejected, *R. v. Luckhurst*, *supra*. But when the inducement is held out by a person who has no authority, the confession will be admissible; as when the prisoner's neighbours, who were not concerned with the prisoner, advised her to tell the truth for the sake of her family, *R. v. Row*, R. & R. 153; *R. v. Taylor*, 8 C. & P. 733. A confession will be inadmissible when it has been obtained by any threat or promise of favour held out by a prosecutor or his wife, *R. v. Baldry*, 21 L.J., M.C. 130; 5 Cox, C.C. 525; *R. v. Spencer*, 7 C. & P. 776; or by a previous master or mistress, when the crime has been committed against

either of them, but not otherwise, *R. v. Moore*, 5 Cox, C.C. 555; or by the attorney of such person in authority, or by a constable or any one acting under a constable, *R. v. Enoch*, 5 C. & P. 539; and especially by a magistrate, *R. v. Drew*, 8 C. & P. 140. The compulsory examination of a bankrupt is admissible, *R. v. Cross*, D. & B., 68; *R. v. Scott*, *Ib.*, 47; *R. v. Sloggett*, *Dears.*, 656; *R. v. Skeen*, *Bell's C.C.* 97.

(e) "Dying declarations," says Eyre, C.B., in *R. v. Woodcock* 1 Leach, C.C. 502, "are made in extremity, when the party making them is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth." It is stated by Lord Denman, 11 Cl. & Finn. 112—"That with regard to declarations made by persons *in extremis*, supposing all necessary matters concurred, such as, actual danger; (2) death following it; (3) full apprehension at the time, of the danger and of death;—such declarations can be received in evidence; but all these things must concur." To these three conditions, a fourth must be added, viz., religious sentiment, *R. v.*

CH. IV., § 38,  
39.

The Rules of  
Evidence  
should be  
observed, and

(38.) Although justices of the peace cannot be expected, either in the execution of their summary jurisdiction, or in the preliminary hearing of charges of indictable offences, to decide nice questions with respect to the admissibility of evidence, yet there is no doubt that they are bound by the laws of evidence generally, and ought always to act within the true spirit of them. Indeed, it is impossible for justices to arrive at a satisfactory conclusion on matters which they have to determine, or to put cases which come before them for preliminary investigation, into a proper train for the decision of another tribunal, without some acquaintance with the general principles of this most important branch of the law.

more strictly  
when sitting  
judicially  
than  
ministerially.

(39.) When justices are acting *judicially*, either exercising a discretionary power, or conclusively determining any question within their jurisdiction, they ought, as far as they can, to apply, and be governed by, the established rules of evidence, though not in a narrow or strict manner, but having regard to the spirit, rather than to the letter, of the rules. When they are acting *ministerially* in the preliminary investigation of charges within the jurisdiction of another tribunal, it would appear that they may with propriety listen to statements not strictly admissible in evidence, for the purpose of arriving at evidence of a more legitimate kind, but always keeping in view the necessity for some legally admissible evidence to establish the charge.

*Pike*, 3 C. & P. 598. A poisoned B and C. B and C died. The declaration of C was admitted against A, in a trial for the murder of B, because the two consecutive deaths formed one transaction, *R. v. Baker*, 2 M. & R. 53.

Dying declarations of an accomplice are receivable, *R. v. Tinkler*, 1 East, P.C. 354; and also dying declaration made in favour of the person accused, *R. v. Scaife*, 1 M. & R. 551.

(40.) All rules of evidence are founded upon reason and experience, or considerations of general convenience and public policy. Their object is to arrive at the truth respecting the matters inquired into, by the surest and safest methods, regard being had to the general applicability of the doctrines. The principal means by which they ordinarily seek to achieve this object, are, to require that evidence should be given under the sanction of an oath or something equivalent, by persons having some religious belief and sense of moral responsibility, and to exclude every species of document and statement which is in its nature and principle untrustworthy, as being irrelevant, or likely to mislead and create prejudice; to sift the evidence adduced, and ascertain its value, and to insist upon the most satisfactory kind of evidence, of which the nature of the case will admit; certain definite exceptions, relaxations, and substitutions, being permitted, in order to prevent failures of justice, and great practical inconvenience, which might result from the uniform and unbending application of the general rules (*f*).

CH. IV., § 40,  
41.

The best  
evidence  
should be  
procured.

(41.) It may be convenient to consider, in the first place, the evidence that may be received; secondly, whose duty it is to adduce evidence; thirdly, what must be proved; and, fourthly, how is it to be proved.

Persons who have not the use of reason are, from their infirmity, utterly incapable of giving evidence, and are, therefore, excluded as incompetent witnesses; such as idiots, lunatics, and children (*g*).

Whose  
evidence may  
be received.

An idiot is permanently incapacitated; a lunatic, only during the period his intelligence is suspended (*h*);

(*f*) Justices of the Peace, by  
Mr. Justice Johnson, of Supreme  
Court of New Zealand.

(*g*) Com. Dig. Test. A 1.  
(*h*) Com. Dig. Test. A 1; Tay.  
Med. Jur. (8 ed.) 866.



CH. IV., § 42, and an infant, until he has acquired a knowledge of the  
43. obligation of an oath, and the religious and secular penalties of perjury. Superficial instruction just before the trial, will not qualify him (*i*). Though a judge may postpone a trial, to instruct an infant in the nature of an oath, the inclination is, however, opposed to this course (*j*).

Competency  
of witness.

(42.) As a general rule, no person is a competent witness, unless he believes in a supreme Being, who will punish him, either in the present, or in 'a future life, for perjury (*k*).

Our law, however, (*l*) makes the evidence of an aboriginal or half-caste native, or of any infant under the age of seven years, admissible, notwithstanding he may be destitute of the knowledge of God, and of any belief in religion, or in a future state of reward and punishment, on his making a declaration to tell the truth, and after his being cautioned by the court that he will be punished if he do not tell the truth; provided that it is proved to the satisfaction of the court that the nature and object of such declaration is understood by the witness. And in the case of a Chinaman the Supreme Court (*m*) decided—1st, that a Chinese witness may be sworn on the Bible; 2nd, that the form of administering the oath is immaterial, the substance only being essential; and 3rd, that if a witness declare that a special form is binding on his conscience, the court is obliged to accept it.

Infamous  
character.

(43.) It is no objection to the competency of a

(*i*) Per Patteson, J., *R. v. Williams*, 7 C. & P. 320. (*l*) No. 197, sec. 42, 1 V.S. 900.

(*j*) *R. v. Nicholas*, 2 C. & K. 246; 1 Leach C. C. 430 (n). (*m*) *R. v. M'Ilree*, 3 W.W. & A'B., L. 32.

(*k*) *R. v. White*, 1 Leach, C. C. 430.



witness, that he is of infamous character, or that he is a party to the record, or otherwise interested in the result of the issue (*n*). Husbands and wives may be witnesses for or against each other, in all civil proceedings (*o*). CH. IV., § 44.

(44.) No person charged with an indictable offence, or any offence punishable on summary conviction, is competent or compellable to give evidence for or against himself (*p*). Statements made during marriage, between husband and wife, are privileged, and the privilege continues after the death of one, or the divorce of both (*q*). Confessions to clergymen or medical men, are privileged, and cannot be evidence without the consent of the person making the confession. Disqualified witnesses.

Communications between barrister or attorney, and client, are also privileged, but the privilege is that of the client, not of the lawyer. This principle extends to the clerk of an attorney, or even to a person who acts as a legal agent, though not a lawyer or a clerk to one (*qq*).

No person will be compelled to give any evidence that may bastardise his issue (*r*).

No evidence given before a board or commission, except in the case of perjury committed before them, can be used against the witness afterwards (*s*). No

(*n*) No. 197, secs. 41 & 43, 1 V.S. 900.

(*q*) No. 197, sec. 46.

(*o*) No. 197, sec. 43, 1 V.S. 900.

(*qq*) *Ross v. Gibbs*, 39 L.J., C.P. 61.

(*p*) No. 197, sec. 45, and the same disability attaches to the wife. But any such person so charged may make a statement (sec. 44).

(*r*) *R. v. Sourton (Inhabitants of)*, 5 A. & E. 180.

(*s*) No. 197, sec. 49.

CH. IV., § 45. witness will be permitted to refuse to answer any question which is "relevant or material" to the matter in issue, on the ground that it may expose him to any penalty or forfeiture, or may tend to disgrace or criminate him (except in the case of adultery), unless the court be of opinion that the answer will subject him to punishment for treason, felony, or misdemeanour (*t*).  
 Witness compelled to answer relevant questions.

A witness who has received a pardon under the Great Seal is not privileged from answering questions, even when he might be found liable, through his answer, to a charge of treason, felony, or misdemeanour (*u*), but the privilege is exclusively the witness's (*v*).

Previous conviction of witness.

A witness may be questioned as to previous convictions, with the view of discrediting his testimony; and if he denies the fact, or declines to answer, the party questioning him may prove the fact (*w*).

(45.) In general, a party cannot impeach or contradict his own witness, and in no case by general evidence of bad character; but he may contradict him by other evidence; or (in case the witness, in the opinion of the court, prove to be adverse) proof, by leave of such court, may be given, that at other times he has made a statement inconsistent with his present testimony. But before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such a statement (*x*). And the same rule applies to a witness upon cross-examination (*y*).

(*t*) No. 197, sec. 48.

(*u*) *R. v. Kinglake*, 22 L.T.

(N.S.) 416.

(*v*) *Ibid* p. 335.

(*w*) No. 197, sec. 50.

(*x*) No. 197, sec. 51.

(*y*) No. 197, sec. 52.

A witness may be asked, on cross-examination, as to CH. IV., § 46.  
 previous statements made by him in writing, or Examination  
 reduced into writing, relative to the subject-matter of upon written  
 the cause or prosecution, without producing or show- evidence.  
 ing such writing to the witness (z). But before he  
 can be contradicted, his attention must be called to the  
 writing.

At any time the court may call for the writing,  
 and make such use of it as it pleases (a). This, how-  
 ever, is very rarely done.

(46.) The "burden of proof" is fixed by a rule of law Who should  
 adopted from the Civil law, "*Ei incumbit probatio, adduce  
 qui dicit, non qui negat, cum per rerum naturam evidence.*  
*factum negantis probatio nulla sit;*" and "the issue  
 must be proved by the party who states the affirma-  
 tive in substance, and not merely the affirmative in  
 form" (b). The proper test is, "which party would  
 be successful if no evidence at all were given." The  
 party who would fail if no evidence were given, is the  
 proper party to begin (c). When the defence is illegality,  
 the party alleging it must prove it; and, if it be justified,  
 the opposite party must disprove the illegality (d). In  
 every case, the *onus probandi* lies on the person who  
 wishes to support his case by a particular fact which lies  
 more peculiarly within his own knowledge, or of which  
 he is supposed to be cognisant (e). As in summary pro-  
 ceedings before justices, the defendant, who claims a  
 qualification (as a license), and not the informer who  
 charges the want of it, must prove the fact, for this is

(z) No. 197, sec. 53.

(a) No. 197, sec. 53.

(b) *Mercer v. Whall*, 5 Q.B.  
 447; *Amos v. Hughes*, 1 M. & R.  
 464; *Faulkner v. Chevell*, 10 A.  
 & E. 76.

(c) *Mills v. Barber*, 1 M. &  
 W. 427.

(d) *Lewis v. Levey*, 27 L.J.,  
 Q.B. 282.

(e) Per Holroyd, J., *R. v. Bur-*  
*dett*, 4 B. & A. 140.

CH. IV., § 47. peculiarly within the knowledge of the former (*f*).

*Onus  
probandi.*

If infancy be pleaded, the pleader must prove it (*g*); so negligence (*h*), legitimacy of children born in wedlock (*i*), the duration of life (*j*), insanity, are all issues in which the *onus probandi* is regulated by the legal presumption as to the fact, and the party who disputes the truth of the presumption in the particular case, is bound to show that it does not apply. And where a man and woman had cohabited for several years as man and wife, and separated on the same footing, the presumption that they were married, is so strong that it can only be rebutted by the strongest and most distinct evidence to the contrary, by the party impugning the marriage (*k*). And modern cases have established that where a party, on whom the onus lies of proving the allegation, gives evidence as consistent with the one view of the case as the other, he fails in his proof (*l*). The right to begin, is to be determined by the judge; though an incorrect ruling by him on this point, will be no ground for a new trial, unless it appear to have caused substantial injustice (*m*).

Substance of  
issue.

(47.) It is enough if only the substance of the issue be proved. A plea of tender is proved sufficiently by evidence of a tender of a larger sum than that mentioned in the plea (*n*). In slander, it is enough to prove the material words on the record; or when there are several actionable words, it is enough to prove some

(*f*) *R. v. Turner*, 5 M. & S. 206; *M' Cormack v. Murray*, 2 W. & W., L. 122.

(*g*) *Hartley v. Wharton*, 11 A. & E. 934.

(*h*) *Marsh v. Horne*, 5 B. & C. 322.

(*i*) Taylor on Ev., sec. 92.

(*j*) *Nepean v. Doe*, 2 Smith's L. C. 510.

(*k*) *Haviland v. Mortiboy*, 32 L. T., 343 (L. C.)

(*l*) Per Erle, J., *Wheelton v. Hardisty*, 26 L. J., Q. B. 272.

(*m*) *Brandford v. Freeman*, 5 Ex. 734.

(*n*) *Dean v. James*, 4 B. & Ad. 546.



of them (*o*); though it is not enough to prove merely equivalent words (*p*). When a defendant was indicted for libel, proof of publication by him was held sufficient (*q*). CH. IV., § 48.

(48.) The evidence must correspond with the allegations, and must prove all that is essential to make out the case, and be confined to the points in issue (*r*). It is a fundamental principle that no credible presumption as to the conduct, intention, or course of dealing between two parties, can be derived from proof of the conduct, intention, or course of dealing between one of them and a third party. Such evidence is said to be *res inter alios acta*, and will be refused as irrelevant to the issue. The fact that A contracted or dealt in a particular manner with B, is no evidence that he meant to contract or deal in the same manner with C. Thus, in an action for goods sold and delivered, in which the defence is that the plaintiff sold them to defendant on certain terms, the defendant cannot show that the plaintiff has sold the same quality of goods to other persons on the same terms (*s*). When it would tend to prove guilty knowledge or intent in uttering forged documents or base coin, such evidence is admissible (*t*). Evidence must be relevant.

In an action by a brewer against a publican, Lord Ellenborough refused to let the plaintiff call witnesses to show that he supplied them, at the time in question, with good beer, the quality being the question in issue (*u*). In criminal cases, the rule is observed, with

(*o*) *Campagnol v. Martin*, 2 W. Bl. 314.

(*p*) Per Lawrence, J., 2 East 434, *Maitland v. Goldney*.

(*q*) *R. v. Hunt*, 2 Camp. 583.

(*r*) Greenl. Ev., sec. 58; Tayl. 194.

(*s*) *Hollingham v. Head*, 27, L.J. (C.P.) 241; *Thomas v. Russell*, 23 L.J., Ex. 233.

(*t*) Ibid per Curiam. *R. v. Foster*, Dears. C.C.R. 456.

(*u*) *Holcombe v. Hewson*, 2 Camp. 391.

CH. IV., § 49. the utmost strictness, that no evidence shall be admitted, which does not tend directly to the proof or disproof of the matter in issue (*v*). No evidence of a previous crime or offence is admissible (*w*), and while the examination in chief is always restricted to the substance of the question in issue, even in cross examination, the court will properly interfere and stop rambling, prolix, or irrelevant questions. Where the question is apparently irrelevant, but the cross-examiner undertakes to show subsequently that the question is material, it will generally be allowed (*x*).

Depositions. (49.) Although the most common and ordinary species of legal evidence consists in the depositions of witnesses taken *on oath*, there are some exceptions to the rule. As, for instance, depositions tendered under sections 80 and 81 of the Justices Statute, 2 V.S., 235 (*y*). The admissibility of such depositions is a matter appertaining to a higher court; it is only necessary here to mention a few rules that should be followed when taking depositions. (1) There must be an accused person before the justices. (2) He must be charged with an indictable offence. (3) The accused, or his counsel or attorney, must be allowed a full opportunity to cross-examine the witnesses. (4) The depositions must be taken down in writing (*z*). (5) There must be a caption. (6) The prisoner has the

(*v*) Wels. Cr. Pr. 183.

(*w*) *R. v. Cole*, 1 Phill., Ev. 508; *R. v. Vandercomb*, 2 Lea., C.C. 816. Generally a cross-examination will be held irrelevant where it tends neither to contradict nor qualify the result of the examination in chief, nor to impeach the credit of the witness. It is also irrelevant in civil proceedings when it is sought to infer an act of a party, from his

dealings with a third party. *Tennant v. Hamilton*, 7 Cl. & Fin. 122; *Hollingham v. Head*, 27 L.J., C.P. 241.

(*x*) *Haigh v. Belcher*, 7 C. & P. 389.

(*y*) These sections correspond with 11 & 12 Vic. ch. 42, Sec. 17 (Jervis' Acts).

(*z*) *Parson v. Brown*, 3 C. & K. 296, neglect of this is fatal.



right to insist upon the insertion of any material omission in the depositions, when read over to him (a). CH. IV., § 50.

(50.) The region of evidence lies between moral certainty on the one hand, as its most perfect extreme, and moral possibility on the other, as its most imperfect extreme. It does not look for more than the first, and it will not act on less than the last. If a strong probability be raised by express evidence, unless the probable consequence may be inferred, the business of life could not be conducted, and justice could not be administered (b). The law always strives to get the deposition of eye-witnesses; though through ignorance, passion, prejudice, and other infirmities of witnesses, such evidence is often intrinsically less satisfactory than many grades of presumptive evidence which are nominally inferior. And this, without reference to the possibility of the witness committing perjury (c). The law, therefore, admits presumptive or circumstantial evidence, where direct evidence cannot be supplied (d). Bounds of Evidence.  
Presumption.

(a) Phill. Evid. 10th ed., vol. 2, p. 106. *R. v. Supple*, 1 A.J.R. 129.

(b) Per Lord Campbell, C.J., *Wheelton v. Hardisty*, 26 L.J., Q.B. 278; 31 L.T., Rep. 303.

(c) "Hearsay evidence" is evidence which is neither the *vivâ voce* statement on oath of a witness who is present, nor the affidavit—when affidavits are admissible—of a witness who may be produced and cross examined, if necessary, and punished for perjury.

(d) The term "circumstantial" is inaccurate, as even direct evidence, when analysed, is found to be presumptive and to depend for its weight on a number of cir-

cumstances that affect the credibility of the witnesses or other proof. But presumptive, as distinguished from direct, evidence is understood to be that species of proof which arises from the existence of a fact, and not from depositions of witnesses or the writings which are substituted for witnesses. As if a man be stabbed in a house, and another man be seen running from the house immediately after, with a bloody sword in his hand—the flight, the weapon, and the blood raise in legal language a *violent* presumption that the second man murdered the first, *Co. Litt.* 6 b. And so when a person is in the possession of the fruits

CIL. IV., § 51,  
52.

Presump-  
tions.

(51.) The following rules are observed in dealing with presumptions, always bearing in mind that "every presumption is liable to be rebutted." (e).

"All the facts proved must be consistent with the theory, and there must be some one substantial credible fact inconsistent with the contrary" (e).

The law presumes, in criminal matters, that every sane person of the age of discretion, intends the probable consequences of an act which may be highly injurious (f).

If a man, by his own wrongful act, withhold the evidence by which the facts of the case would be manifested, every presumption to his disadvantage will be adopted (g).

A tenant cannot dispute his landlord's title (h).

If a tenant show a receipt for rent, it is presumed that all previous rent has been paid (i).

A mortgagor in possession is presumed to have authority to distrain as the bailiff of the mortgagee (j).

Possession is *prima facie* evidence of seisin in fee (k).

General and  
special pre-  
sumptions.

(52.) There are various facts or propositions which may be presumed from the existence of others, and of these presumptions, some are of a general, and some of a specific, character. Some are very strong, or "very

of crime, recently stolen, he is called upon to explain how he got them.

(e) Per Willes, J., *G. W. Rly. Co. v. Rimmell*, 27 L.J., C.P. 201. In the case of homicide, malice is presumed, as in libel that the defendant intended to injure the plaintiff.

(f) *Haire v. Wilson*, 9 B. & C. 643; *Bromage v. Prosser*, 4 B. & C. 255.

(g) *Armory v. Delamirie*, 1 Sm. L.C. 153 *et notæ*.

(h) *Balls v. Westwood*, 2 Camp. 12. But a tenant may show that it has expired, *England v. Slade*, 4 T.R. 682.

(i) 1 Phill. 492.

(j) *Trent v. Hunt*, 22 L.J., Ex. 318.

(k) *Webb v. Fox*, 7 T.R. 397, per Ld. Kenyon.

violent;" some merely probable; and others of little weight. It would be out of place here to enter into the scientific distinctions between presumptions of law and presumptions of fact, or presumptions of law which are conclusive and those which are disputable. It is only intended to give a few of the most usual cases of presumptions.

(53.) It is a presumption of law which cannot be rebutted, that every person subject to the law is acquainted with the law (L); that an infant under seven years of age cannot be guilty of felony; that a female under ten years is incapable of consenting to sexual intercourse; that a boy under fourteen years is incapable of committing rape, or an assault with intent to commit a rape. Infants between seven and fourteen years of age are, *primâ facie*, supposed to be incapable of crime; but evidence of deliberation, of cunning, and of malice, is admissible to rebut the presumption; and there are cases in the books in which children of eight, nine, and ten years of age were found guilty, and executed, for murder and arson. A married woman, who takes part with her husband in the commission of a crime, is presumed to act under the coercion of her husband, but this may be rebutted by evidence that she acted as a free agent.

Presumptions  
that cannot  
be rebutted.  
Knowledge of  
law.

(54.) Recent possession of stolen goods raises a strong presumption against the possessor, that he stole the goods, and he is called upon to rebut this presumption. The strength of the presumption varies widely, according to the nature of the goods, the circumstances and position of the accused, and the length of time which has elapsed between the theft, and the discovery of the goods in his possession. For

Recent  
possession.

CH. IV., § 55. instance, to ask a shopkeeper to account for the possession of a marked shilling, even the day after it was stolen from another, would be unreasonable, as the shilling might have passed through various hands in the meantime, and the shopkeeper may have had it, without noting the mark, from any one of a great number of persons who had been in his shop. But it would be only reasonable to expect that a labourer found in possession of a watch several months after it was stolen, or any one found in possession of a horse (unless he were a horsedealer, or the possessor of a great number of horses) twelve months after it had been stolen, should give a reasonable and satisfactory account of the mode in which he came into possession of the property, or the animal, stolen; and, in the absence of such account, it would be reasonable to conclude that he had stolen it.

As a general rule, the theft must be proved first; but there are cases when even this will be presumed—as when a man was seen to break into a wine-cellar, sober, and to come out of it, an hour or two afterwards, drunk; it would not be unreasonable to presume that he had stolen some wine and drunk it.

Possession of  
property.

(55.) There are cases which bear a close analogy to those of recent possession of stolen property. As when, for the purpose of proving who committed the offence, something found in the possession of a prisoner is used as a link of connection between the act and the person; as, for instance, when an accused person is found in possession of a knife with a broken blade, and the corresponding part of a knife blade is found in a door, or a window, or box, that has been broken open; or when, on a charge of murder or unlawful shooting, a piece of paper in the possession of the accused is proved to correspond minutely with another piece of paper dis-



charged from the gun used in the commission of the offence (*m*). The weight and value of such presumptions, must necessarily vary according to the surrounding circumstances. A guilty knowledge is presumed from surrounding circumstances. CH. IV., § 56.

(56.) Persons acting in official capacities, are presumed to have been duly appointed and duly authorised (*n*). And it is presumed that all who act as justices of the peace, or as constables, have been duly appointed (*o*). Official appointments.

Where a question arises as to the life or death of a person once shown to be living, the presumption is that the person continues alive, until the contrary is shown. The long-continued and unexplained absence of a person from his home, and the non-receipt of intelligence concerning him, by the person most likely to have heard from him, raises a presumption of death. If a person has not been heard of for seven years, there is a presumption of law that he is dead, but the *onus* of proving that the death took place at any particular time within the seven years, lies upon the person who claims a right, to the establishment of which, that fact is essential (*p*). Presumption as to life or death. Still, this presumption of death after

(*m*) *R. v. Nihill*, Sandhurst Cir. Ct. 18.

(*n*) *R. v. Verelst*, 3 Camp. 433, per Ld. Ellenborough. But this rule does not apply to *private* appointments, such as that of town clerk, *R. v. Mayor of Stamford*, 6 Q.B. 433. But a private document is presumed to have been written at the time it bears date, *Malpas v. Clements*, 19 L.J. (Q.B.) 435. Orders of justices will be presumed to have been made ac-

cording to all statutory formalities, *Williams v. Eyton*, 27 L.J. Ex. 177, 28 L.J. Ex. 146. And so, debts due over six years are presumed to have been paid, and land held over fifteen years adversely, to have been duly conveyed.

(*o*) *Berryman v. Wise*, 4 T.R. 366.

(*p*) *In re Phene's Trusts*, L.R. 5 Ch. App. 139.

Cir. IV., § 57, seven years' absence does not arise, if the probability of  
 58. the receipt of intelligence from the person, be rebutted  
 by circumstances.

Admissions by  
 persons under  
 arrest.

(57.) The general doctrine of admissions is, that whatever a man says or does which necessarily implies an admission of his guilt, or tends to prove it, is evidence against him; the presumption being very strong that such an admission must be founded on the consciousness of guilt, and that the accused would not expose himself to the inconveniences which must result from it, if it were not true. And statements made by another person in conversation with the accused, or in his presence, are admissible as evidence against him, because his conduct, or language, or his silence, on hearing them, may tend to show whether he disputed, or acquiesced in, the truth of the matter stated.

Recommendations to  
 constables as  
 to statements of persons  
 arrested.

(58.) Much difficulty has arisen from the ignorance of constables, with respect to the law affecting voluntary statements made by persons charged with offences. It is a general rule of law that a statement by an accused person, touching his guilt, must be voluntary. It is very important that the attention of all constables should be called to their duties in this respect, inasmuch as they are very apt, unwittingly, to frustrate justice by indiscreet zeal. It is not the duty of a constable to prevent a person whom he has apprehended, from making statements which may tell against him; but it is no part of his duty—on the contrary, it is improper for him—to use any language, or do any act, which will tend to make the accused believe that it will either be better for him if he do, or worse for him if he do not, make a statement concerning the charge. The safest, as well as the fairest, course is, that the constable should tell the prisoner, immediately on his apprehension, what he is charged with; or, if there be a warrant, to read the



warrant to him. If the prisoner then make any statement voluntarily, the constable should not stop him, but, on the contrary, pay close attention. If the constable should ask any questions thereupon, the subsequent statements would not thereby be rendered inadmissible, if no inducement or threat were used; but it is not advisable that the constable should ask questions (except for mere explanation of what the prisoner has already said), without cautioning the prisoner that anything he says may be used against him at his trial. It is most desirable that constables should at once, or at the earliest practicable moment, write down anything material which the prisoner has said; and it should be the whole of the material part of the statement, and not merely a detached portion of it.

This caution, indeed, is desirable with respect to all statements made by prisoners at any time during their detention, as reports of conversations, and of oral extrajudicial confessions, from memory, are always looked upon in courts of justice with some distrust. It may be a good rule to adopt, that every constable who brings in a prisoner to the police-station or prison, should be required to repeat to the officer in charge, any statement or remark of a material kind, made by the prisoner on his apprehension, or on his way to prison; and that such constable or officer in charge should enter such statement in a book, and cause the constable to read the writing over, and to sign it while the statement is fresh in his memory. Of course the language or conduct of a prisoner before he was charged, which either led to his being charged, or at all events tended to prove that he admitted, or showed his consciousness of having done, the act, with the commission of which he is afterwards charged, is also good evidence against him. Although our Evidence Act, sec. 57, says:—"No confession which is

Statements of  
prisoners  
when under  
arrest.

CH. IV., § 59. tendered in evidence on any trial, shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer shall be of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made; nor shall any confession which is tendered in evidence on any trial, be rejected on the ground that it purports to have been made on oath, if proof can be given to the judge or other presiding officer, that in fact it was not so made." The precautions stated above, should not be disregarded, as the Supreme Court has, on more than one occasion, rejected evidence, when it was given under circumstances that indicated an inducement (*q*).

Admissions  
by parties to  
the record in  
actions on  
contract.

(59.) An admission made by any of the parties on the record, is evidence against him, whether it corroborates the contents of a deed or other written instrument, or not (*r*). Of course, admissions, properly so called, can only be made in civil actions or suits, and are not allowed in criminal proceedings. They are regarded as being a waiver of proof, on the part of their makers, rather than as evidence against them. Such admission, however, may be explained that they were made under a mistake, or are untrue (*s*), except when some person acted on such statement, as in the recitals of a deed (*t*). The admission of a partner is evidence against his co-partners (*u*), and that of an agent is evidence against his principal (*v*).

(*q*) *R. v. Crossen*, Ballarat Cir. Ct. 1863.

(*r*) *Slatterie v. Pooley*, 6 M. & W. 664.

(*s*) *Heane v. Rogers*, 9 B. & C. 586.

(*t*) Com. Dig. Ev. (B 5).

(*u*) *Lucas v. De La Cour*, 1 M. & S. 249; *Rapp v. Latham*, 2

B. & A. 795; and the principle extends to a retired partner, *Wood v. Braddick*, 1 Taunt. 104.

(*v*) *Langham v. Alnutt*, 4 Taunt. 519; *Reid v. Hoskins*, 26 L.J., Q.B. 5. The admission of an agent, must be part of the contract *res gestæ*, and a letter from the agent to the principal, will

(60.) In actions of tort, and in criminal prosecutions, CH. IV., § 60. the admissions of one defendant will not affect another In actions of  
tort. (*w*). The admissions of agents are receivable in criminal cases, but only to create a civil liability in the principal (*x*). An attorney is presumed to have authority, and his admission in an action, will bind his client, but everything he says in course of conversation, is not evidence in the cause (*y*); but it must first be proved that he was the attorney at the time the admission was made (*z*), and an admission made by an attorney's clerk or agent, is as valid as if made by the attorney (*a*). It was considered in a *Nisi Prius* case, that if counsel open statements which he does not prove, the opposite party may treat them as admissions; but the doctrine has been disputed in a later case (*b*). In civil cases, counsel can make admissions (*c*), but it seems that, in criminal cases, neither attorney nor counsel can (*d*). A wife has no implied authority to make admissions in prejudice of her husband's rights, even though he possess such rights *jure uxoris* (*e*). Nor can her confession of a tort committed by her, be given in evidence to affect her husband in an action, in which he is liable for costs and damages (*f*). *Alderson, B.*,

not be evidence as an admission, *Langham v. Allnutt*. And a principal will not be prejudiced by the unauthorised admission of an agent, *Powell on Ev.* 159. The authority of directors to bind a company, must be proved by the deed or other extrinsic evidence, *Ridley v. Plymouth Banking Co.*, 2 Ex. 711. Agency must be proved before the admission can be received, *Burnside v. Dayrell*, 3 Ex. 224.

(*w*) 1 Phill. Ev. 371.

(*x*) *Lord Melville's Case*, 29 How. St. Tr. 746 to 764.

(*y*) *Petch v. Lyon*, 9 Q.B. 147.

(*z*) *Wagstaff v. Wilson*, 4 B. & A. 339.

(*a*) *Taylor v. Williams*, 2 B. & Ad. 845.

(*b*) *Duncombe v. Daniell*, 8 C. & P. 222; *Machell v. Ellis*, 1 C. & K. 682; *Darby v. Ousely*, 25 L.J., Ex. 233, 2 Jur., N.S. 500. *Colledge v. Horn*, 3 Bing. 119.

(*c*) *Swinfen v. Swinfen*, 26 L.J., C.P. 97.

(*d*) *R. v. Thornhill*, 8 C. & P. 575.

(*e*) *Alban v. Pritchett*, 6 T.R. 681.

(*f*) *Denn v. White*, 7 T.R. 112.

CH. IV., § 61. said (g):—"A wife cannot bind her husband by her admissions, unless they fall within the scope of the authority which she might be reasonably presumed to have derived from him; and when she is carrying on a trade, if it be necessary for that purpose that she should have such a power, she may be his agent to make admissions with respect to matters connected with the trade, but that would not extend to a contract for the hire of a ship." A wife can only bind her husband as his agent (h). In actions against a husband for goods supplied to his wife, the jury ought to be asked not only whether the goods were necessaries, but also whether the wife had authority to buy (i), for a wife has no original authority to pledge her husband's credit at all (j). The authority of a wife to bind her husband for necessaries supplied to her when turned out of her house, is a presumption of law, and not to be rebutted. But, during cohabitation, the authority of the wife to bind her husband for articles suitable to her station and degree, is a presumption of fact, which can be rebutted by showing that the wife had no such authority; and what that degree and station shall be, is for the husband to decide (k). When the business is such as is usually transacted by women, a wife's admission concerning it, has been received against her husband (l).

Statements made in the presence of a party to the cause.

(61.) One of the most common admissions that are used in courts, is a declaration made by the witness in the presence of a party to the cause, which becomes evidence, on showing that the party, on hearing such a

(g) *Meredith v. Footner*, 11 M. & W. 202.

(h) *Manby v. Scott*, 2 Smith's L.C. 396.

(i) *Read v. Teakle*, 22 L.J., C.P. 161.

(j) *Renauw v. Teakle*, 22 L.J., Ex. 241.

(k) *Harrison v. Grady*, 12 Jur. (N.S.) 140.

(l) *Anon.*, 1 Strange 527.



statement, did not deny its truth. Such an acquiescence, indeed, is worth very little, when the party hearing it, has no means of personally knowing the truth or falsehood of the statement (*m*). Acquiescence in an act, is also evidence of admission; but to make it so, some act of the mind must be shown, as voluntary demeanour, or the conduct of the party (*n*); as, if an account be delivered, and retained for any time without objection, it is presumed to be correct (*o*). An objection to one of several items in an account, without remark as to the others, is evidence of an admission that they are correct (*p*). A notice to quit, served and not objected to, is evidence that the tenancy commenced as fixed by the notice (*q*); and in "use and occupation," payment of rent is evidence of a holding and of its terms (*r*).

(62.) A witness must only state facts, and his mere personal opinion is not evidence. But the opinion of a skilled or scientific witness is admissible as evidence to elucidate matters which are of a strictly professional or scientific character (*s*).

CH. IV., § 62.

Facts, not  
opinions,  
must be  
stated.

(*m*) Per Parke, B., *Hayslep v. Gymer*, 1 A. & E. 163; *Neile v. Teakle*, 7 C. & K. 709.

(*n*) Taylor on Ev. 537.

(*o*) *Willis v. Jernegan*, 2 Atk. 252.

(*p*) *Chesman v. Count*, 2 M. & G. 307.

(*q*) *Thomas v. Thomas*, 2 Camp. 647.

(*r*) *Harden v. Hesketth*, 28 L.J., Ex. 137. Admissions may be implied from the form of pleadings, *Boyle v. Webster*, 21 L.J., Q.B. 202; *Hewitt v. Macquiere*, 21 L.J., Ex. 30. But no admission made "without prejudice" can

be given in evidence, nor the answer to such admissions, *Paddock v. Forrester*, 3 M. & G. 903. An offer of a compromise unaccompanied by any such qualification, is strictly receivable in the nature of an admission. *Wallace v. Small*, M. & M. 446.

(*s*) *Campbell v. Richards*, 5 B. & Ad. 846. In *Greville v. Chapman*, 5 Q.B. 731, an action for libel arising out of a race-horse transaction, Lord Denman allowed a witness to be asked on re-examination whether he did not consider a certain course of conduct to be dishonourable.

CH. IV., § 63.

Hearsay  
evidence not  
allowed.

(63.) Hearsay evidence is inadmissible, as a general rule. The exception which the rule admits of, appears to be, when the object of the evidence is to satisfy the court on matters which are for the court, and not for the jury. In these cases hearsay evidence is unobjectionable, even when the court is discharging the functions of a jury; as, when it is necessary to show that a reasonable search has been made for a lost indenture, a witness may be asked whether he has inquired of persons who were likely to know about it, and what answers were given to his inquiries (*t*). Where the defendant tendered in evidence, accounts rendered to him by J. B., to show that he had accounted for the very rents received from the plaintiff, and that he had acted as his agent—held that the accounts were inadmissible, the person who rendered them being alive (*u*). Hearsay evidence may be admitted, in corroboration of a witness's testimony, to show that he affirmed the same thing on other occasions, and that he is still constant to himself (*v*); also, when it can be regarded as essentially connected with the *res gestæ*—as, in an action for false imprisonment, and justification pleaded on the ground of forgery of a bill of exchange, which had been, in consequence, dishonoured on presentment to the drawee, a witness was allowed to state what the drawee said at the time of his refusing to pay (*w*). It may be admitted also, in the case of language uttered by the holders of seditious meetings, in order to show their object and character; and of inscriptions on flags used at such meetings, without producing them (*x*). What is said, and what is done, at meetings, are dealt with differently.

(*t*) *R. v. Inhabitants of Brain-tree*, 28 L.J., M.C. 1.

(*u*) *Spargo v. Brown*, 9 B. & C. 935.

(*v*) *Holliday v. Sweeting*, Bull. N.P. 294 (b).

(*w*) *Perkins v. Vaughan*, 4 M. & G. 988.

(*x*) *R. v. Hunt*, 3 B. & A. 574.



What is said is not admissible until the authority of CH. IV., § 64. the speaker is shown; but what is done is admissible without proof of authority, because there is no danger of being misled (*y*). In cases of partnership and agency, the acts or parol agreements of a partner or agent, made in the ordinary course of business, bind a co-partner or principal respectively, and may therefore be given in evidence for or against the latter (*z*).

(64.) The rule of law, that the best evidence should be given, leads to the necessity, in all cases, of producing written evidence in preference to oral; that is where the written document affects more than the witness, or the party on whose behalf it is presented. A party to a cause cannot make evidence *for* himself, by producing something which he has written. It may, however, be made evidence by the opposite party. For instance, a written receipt is *prima facie* evidence of payment, but it is not the only evidence, because a written acknowledgment by a creditor that he has been paid, is not necessarily better evidence than the oral evidence of a debtor who swears that he has paid the money. When written evidence preferred to oral.

(*y*) *Bruce v. Nicolopulo*, 3 W. R. 483. To prove that a bankrupt keeps his house, proof may be given that he was denied to his creditors, by a servant at his house, *Fisher v. Boucher*, 10 B. & C. 710. In criminal cases, however, the rule is more strict. The modern practice in cases of rape, is to reject evidence of the statements of a deceased or absent prosecutrix, although made at, or immediately after, the commission of the crime, *R. v. Megson*, 9 C. & P. 420; *R. v. Gutteries*, *Ibid.* 471. Though, in a case of manslaughter, the statement of the deceased, in the absence of

the prisoner, *shortly after* the accident through which the death ensued, was admitted, *R. v. Foster*, 6 C. & P. 325. The statement of a deceased mother was received as to her child's parentage, *Hargrave v. Hargrave*, 2 C. & K. 701. Letters written by one conspirator to another, were admitted against a third, after his complicity was established, *Hardy's Trial*, 24 How. St. Tr. 451; *R. v. Hardwick*, 11 East 578.

(*z*) *Sandilands v. Marsh*, 2 B. & A. 673; *Doe d. Graham v. Hawkins*, 2 Q.B., 212.

CH. IV., § 65. In such a case the payment may be proved either by producing the creditor's receipt and proving his signature, or by the oral deposition of the debtor (*a*); and so a tenancy may be proved without producing the lease (*b*), by proving payment of rent (*c*). If the terms of a tenancy were material, the writing would have to be produced (*d*). The fact of the existence of a writing, or of its execution, may be proved without producing the writing, but not any of its contents (*e*). A paper writing, which may in itself be inadmissible, will, nevertheless, be allowed to be read by a witness to refresh his memory, and in that way its contents become evidence, as in *Maugham v. Hubbard* (*f*), a witness said the entry in a cash-book had his initials. He had no recollection of receiving the money, except by the book; but seeing his initials, he had no doubt he had received the money. *Lord Tenterden* held that the paper itself was not used as evidence of the receipt of the money, but that, on the witness refreshing his memory by seeing it, he said he had no doubt that he had received the money; and that there was sufficient parol evidence to prove the payment.

Secondary  
evidence.

(65.) A witness cannot be asked whether his name is written in a book; the book must be produced, or its non-production be excused according to the principles under which secondary evidence is admissible (*g*). Neither can a witness be examined as to the contents of a letter, but the whole letter must be read (*h*). An exception to this rule, however—that parol secondary

(*a*) Powell on Ev. 43.

(*b*) *R. v. Kingston-upon-Hull*,  
7 B. & C. 611.

(*c*) *Tryman v. Knowles*, 22  
L.J., C.P. 143.

(*d*) *R. v. Merthyr-Tidvil*, 1 B.  
& Ad. 31.

(*e*) *Darby v. Ouseley*, 25 L.J.,  
Ex. 227; 2 Jur. (N.S.) 497.

(*f*) 8 B. & C. 14.

(*g*) *Darby v. Ouseley*, 25 L.J.,  
Ex. 227.

(*h*) *Queen's Case*, 2 B & B.  
286.

evidence is inadmissible when there is parol primary CH. IV., § 65.  
evidence which ought strictly to be produced, is found in the principle, that "whatever a party says or does, his acts, amounting to admissions, are evidence *against* himself, though such admissions must involve what must necessarily be contained in some deed or writing." This is on the principle that whatever a party himself admits to be true, as against himself, may reasonably be presumed to be so. The weight and value of such testimony is quite another question (i). This exception has excited much controversy (j); but it was sanctioned by the Court of Exchequer in a late case, although it is limited to cases in which the admission has been a voluntary one by the party making it; and questions which tend to elicit them, ought not to be allowed (k). When a party gives a portion of a writing in evidence, the adverse party is entitled to have read, all other passages which are connected with, or construe, control, modify, qualify, or explain, the passages which have been read; but no distinct passage, or passages which are irrelevant to, or not explanatory of, such first-mentioned passages. When the writing has been drawn up by the witness for his own convenience, it is inadmissible as a writing, but may be used by the witness to refresh his memory. The general rule for determining whether a writing is primary or secondary evidence, is to consider whether it contains the substance of the issue, and is in the nature of a contract, or an admission of the parties; or whether it is only in the nature of a personal and *ex-parte* memorandum. In the former, it is the best evidence; in the latter, it can only be used to refresh the memory.

(i) *Slatterie v. Pooley*, 6 M. & W. 668.

(k) Pollock, C.B., 25 L.J., Ex. 227, *Darby v. Ouseley*.

(j) Taylor on Ev. sec. 381-3.

CH. IV., § 66, (66.) Instruments which are required by law to be  
 67. attested must be proved by the attesting witness, unless  
 Documentary evidence. such instruments are thirty years old, in which case  
 they prove themselves (*l*); and although there may be  
 attesting witnesses to an instrument, it is not necessary  
 that they should be produced to render the document  
 admissible when attestation was not required by  
 law (*m*).

Public  
 records.

(67.) Examined copies, or copies duly authenticated,  
 of proclamations, treaties, Acts of State, of any part of  
 Her Majesty's dominions, or of any foreign State; and all  
 judgments, decrees, orders, and other judicial proceedings  
 (*n*) of any court of justice in any part of such dominions,  
 or in any foreign State; affidavits, pleadings, wills,  
 codicils, filed or deposited in any such court; may be  
 proved in any court of justice without production of  
 the originals (*o*). Crown grants may be proved by  
 production of the original, which proves itself, or a  
 copy certified by the Registrar-General (*p*); registers  
 of vessels, by the original, or an examined copy  
 thereof, or a copy purporting to be certified by the  
 person having charge of the original (*q*).

The fact of the trial, conviction, or acquittal of any  
 person charged with an indictable offence, may be  
 proved by a certificate containing the substance of the  
 indictment or record, purporting to be signed by the  
 officer having the custody of the records, without proof

(*l*) *Doe v. Burdett*, 4 A. & E.  
 19.

(*m*) No. 197, sec. 55. *Smith v.*  
*Martin*, 3 W.W. & A'B. 36. But  
 in an *ex parte* case the court will  
 insist upon production of the  
 attesting witnesses. *In Reay's*  
*Estate*, 1 Jur. (N.S.) 222.

(*n*) Depositions before Justices

in New Zealand were received  
 under this authority, *Eastwood*  
*v. Bullock*, 1 W. W. & A'B. 92  
 (Law).

(*o*) No. 197, sec. 20, 1 Vic.  
 Stat. 907.

(*p*) No. 197, sec. 21, *Ibid*.

(*q*) No. 197, sec. 22.



of the signature or official character of the person who signed the certificate (*r*). CH. IV., § 68.

(68.) The Evidence Act greatly facilitates the proof of public documents. All Acts of State of any part of Her Majesty's dominions, or of any foreign State, judicial proceedings (and these include depositions taken before justices in other colonies) of any court of justice, may be proved by examined copies. If a State document, the copy must be under the seal of that part of Her Majesty's dominions, or of the foreign State, to which the original document belongs. Proof of public documents.

If a judicial proceeding, or paper filed in any court, the copy must be sealed with the seal of the court; and if the court have no seal, then it must be signed by the judge, who must state that the court has no seal.

In such cases, no proof of the seal or signature, or of the judicial character of the person signing, need be given; and every such copy shall be *prima facie* evidence of the original (*s*). Books or documents of a public nature, which prove themselves on mere production, may be proved by a certified copy (*t*); and when by any law now or hereinafter in force the proceedings of any corporation "shall be receivable in evidence," such proceedings may be proved by a sealed copy, without proof of the seal, or, if signed, without proof of the signature or of the official character of the person purporting to have signed the same (*u*).

Any writing whatsoever may be proved by production of a machine copy of such writing, without

(*r*) No. 197, sec. 23.

(*s*) No. 197, secs. 20-25.

(*t*) No. 197, sec. 23.

(*u*) No. 197, sec. 24.

CH. IV., § 69. proof of comparison with, or notice to produce, the original (*v*).

When forged documents are tendered in evidence, justices are authorised, on the request of any party, to impound such documents, and to direct that they be kept by an officer of the court until further orders (*w*).

Matters  
judicially  
noticed.

(69.) But there are various things of which it is not necessary to give any evidence, either in criminal or civil proceedings—namely, those of which all tribunals must take judicial notice. Among the most important of these are the Common and Statute law, the law of nations, (but not the laws of foreign countries, or of other colonies, which must be proved as a matter of fact), the prerogatives of the Crown, the Articles of War, and royal proclamations, (copies being admissible to instruct the court), the Privy Seal, the public seal of the colony, the signatures of the Governor, Chief Secretary, Judges of the Supreme Court, Registrar of the Supreme Court, the Commissioner of Titles, Registrar-General, Assistant Registrar-General, Deputy Registrar-General, Judge of any county court or court of mines, Commissioner of Insolvent Estates, in and for any part of the colony, Judge of any court of bankruptcy or insolvency hereafter to be established, Prothonotary, or Master in Equity; provided such signature shall be attached or appended to any document, order, certificate, affidavit, or other judicial or official document (*x*); the *Government Gazette* (*y*); votes and proceedings of the Legislature (*z*); the privileges of the House of

(*v*) No. 197, sec. 29. It has been held that there was no necessity to prove it was a machine copy. It was for the Court to determine whether it was admissible as such or not,

*R. v. Ryan*, 1 A.J.R. 27.

(*w*) No. 197, sec. 33.

(*x*) No. 197, sec. 54.

(*y*) No. 197, sec. 26.

(*z*) No. 197, sec. 27.



Commons on production of the votes and proceedings CH. IV., § 69.  
without other proof (a) ; and every document which,  
by any law now or hereafter in force, would be  
admitted in any court of justice in England or Wales,  
or Ireland (b). Probate of any will, and letters of  
administration (obtained, or having operation within  
the colony), are received as *primâ facie* evidence,  
without further evidence of the original will (c).

(a) 8 and 9 Vic. c. 113, sec. 3

(c) No. 197, sec. 28.

(b) No. 197, sec. 31.

## CHAPTER V.

### CORPORATIONS.

CH. V., § 70-72. (70.) UNDER the Boroughs and Shires Statutes, the Mining Companies Limited Liability Act, and the Mining Statute, justices are expressly authorised to hear and determine cases that involve a necessary acquaintance with the law relating to corporations.

Corporations within the jurisdiction of justices.

Different sorts of corporations.

(71.) A corporation is a franchise created by the common law, by Act of Parliament, by prescription, or by charter (*a*). In this colony there are no corporations created by the common law or by prescription, and of the remaining two, it will only be necessary to consider the law as regards corporations created by Act of Parliament.

What is a corporation, and its capacity.

(72.) A corporation is a collection of individuals united in one body under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting, in several respects, as an individual, particularly in the taking and granting property, in contracting obligations, in suing and being sued, in enjoying privileges and immunities in common; according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence (*b*).

(*a*) Co. Litt. 250a.

(*b*) 1 Kyd. 13. "According to 1 Rolfe's Abridgement, 513 g, by

the making of a corporation, all necessary incidents are included, amongst which those of making

(73.) There cannot exist, in the same place, two independent corporations with general powers of government (*c*). The name given to a corporation when incorporated, is the tie that unites all its members; and if there be any material deviation from the name, the corporation will not be bound or affected. Where a corporation, the name of which was "The Mayor and Burgesses of the Borough of Stafford, *in the County of Stafford*," sued, omitting the words italicised in their name, a plea of abatement was held good (*d*). Indeed, the tendency of modern decisions is to establish, as a principle, that a corporation can only be recognised by its name, and any variation from it will be fatal (*e*). While all suits by or against a corporation, must be in its corporate name, the same principle is extended to corporations created elsewhere, which are, by the comity of nations, permitted to sue in our courts in their corporate capacity, as natural persons could (*f*). A corporation created under one statute, is a different body from that created under another Act, although the name and the members are not changed (*g*).

CH. V., § 73,  
74.

Name of corporation to be accurately stated.

(74.) The capacity of corporations to contract, must be ascertained by reference to the Act of incorporation. As a general rule, a corporation could not sue in *assumpsit* on an executory contract, unless empowered by the Act of incorporation to do so (*h*). It may do so, on an

Capacity to contract.

by-laws, pleading and being impleaded, and the means of perpetual continuance in succession."

(*c*) 2 T.R. 569, per Ashurst, J., *R. v. Amery*.

(*d*) *Stafford v. Bolton*, 1 B. & P. 40.

(*e*) *Iredale v. Guiding Star Company*, A.R. 3-9-67; *R. v. Inhabitants of Haughley*, 4 B. & A. 655; *Mellor v. Spateman*,

1 Wms., Saunders in Notes; *R. v. Mayor of Ripon*, 2 Salk. 433; *Rodda v. Guiding Star Co.*, S.C.V. 14-9-67; *Clay v. Oxford*, 36 L.J., Ex. 15.

(*f*) Str. 612. *Ld. Raym.* 1532.

(*g*) *Irving v. Minerva Gold Mining Co.* 3 W.W. & A'B., L. 78.

(*h*) *East London Waterworks v. Bailey*, 4 Bing. 283.

CH. V., § 75. executed contract (*i*); as for tolls (*ii*), or for goods sold and delivered. But when the contract was for the supply of goods, for the manufacturing and supplying of which, the company was incorporated, *assumpsit* was maintainable even on an executory contract (*j*). The difficulty appeared to be, that a corporation could not "promise," unless empowered to do so. In one case, a local Act enabled a corporation to issue promissory notes under its seal; it was doubted whether that authorised it to make a promise, and so subject itself to an action of *assumpsit* (*k*). These decisions are chiefly of value now, in determining the principle that a corporation must act within its powers, as given by its Act of incorporation. It is the creature of statute; its powers are limited to those given by statute (*l*). Under recent statutes, and particularly under those which magistrates will be called upon most frequently to administer (*m*), such as those referring to mining companies, and municipal and shire councils, the authority to contract has been extended so as to place corporations almost on an equality with natural persons.

Corporate  
seal, and how  
contracts are  
made.

(75) As corporations transact their business by means of a governing body, it is evident that the assent of that body must be obtained before the corporation can be bound; and the question now to be considered is

(*i*) *Stafford v. Till*, 4 Bing. 75.

(*ii*) *Carmarthen v. Lewis*, 6 C. & P. 608.

(*j*) *Church v. Imperial Gas Co.*, 6 A. & E. 846.

(*k*) *Stark v. Highgate Co.*, 5 Taunt 792; *Attorney-General v. Northern Rly. Co.*, 11 De G. & Sm. 154; 2 P. Wms. 209; 4 Coke 77 b, 78 a; *Attorney-General v.*

*Mayor of St. Kilda*, 6 W.W. & A'B. Eq. 141; *M'Kean v. Cleft in the Rock Co.*, A.R. 11-4, 1868; *Newman v. Mayor of Maryborough*, A.R. 9-7, 1867.

(*l*) *Irving v. Minerva Co.*, 3 W.W. & A'B. 78; in re *John Bear*, S.C.V. Eq. 12-8-69.

(*m*) No. 358, No. 359, and No. 228.

how that assent is to be expressed. At common law, it Cir. V., § 76. could only be done by its common seal (*n*). The Legislature has given increased facilities to corporations, for entering into contracts, even allowing implied contracts to be enforced by and against them (*o*); their officers, in certain cases, have been authorised to contract on their behalf; and the courts have extended the rule, making them responsible not only for contracts when they were within the legitimate scope of their powers, but also for torts committed by their officers, and in their service.

(76.) It was for a long time doubted whether an Liability for wrongs. action for malicious prosecution could be maintained against a corporation, as it was urged that malice was an act of the mind, and a corporation has no mind (*p*); but these doubts have been set at rest (*q*), and now it may be fairly inferred that the disposition of the law is to render a corporation—which is called by lawyers a metaphysical *persona*—as liable for its contracts or the wrongs committed by it, as natural persons would be. It was doubted whether a corporation could be a petitioning creditor in insolvency, because the petitioning creditor must make an affidavit, which a corporation could not do (*r*). But the Full Court, on appeal in a similar case, held that it was a matter for the discretion of the judge, to receive an affidavit made by any of the officers of a corporation (*rr*).

(*n*) *Arnold v. Mayor of Poole*, 2 Dowl. (N.S.) 574; 4 M. & G. 860.

(*o*) No. 358, No. 359, & No. 409.

(*p*) *Stevens v. Midland Rly. Co.*, 10 Ex. 352, 23 L.J., Ex. 328.

(*q*) *Walker v. South-Eastern Rly. Co.*, L.R. 5 C.P. 640; 39 L.J., C.P. 346; 23 L.T. (N.S.) 14.

*Youngdale v. Keogh and Australian Woollen Co.*, A.R., 2-12-1868.

(*r*) *In re Lecky*, 3 W.W. & A'B., I.E. & M. 42, per Molesworth, J.

(*rr*) *In re Williamson*, 3 W.W. & A'B., I.E. & M 42.



CH. V., § 77.

Corporate  
agents, how  
appointed.

Attorney.

The authority  
of American  
decisions.

(77.) A corporation must necessarily act through its officers. Under the common law (*s*), a corporation aggregate, as it was merely an artificial being, could not act, except through the instrumentality of an agent or an attorney, either specially pointed out by the Act of incorporation, or specially authorised by the corporation to act on its behalf. It could not levy a fine, acknowledge a deed, or appear in a suit, except by an attorney or agent (*t*); and it is an inflexible rule, that such attorney or agent must ordinarily receive his appointment under the corporate common seal (*u*). But this doctrine has undergone considerable modification, particularly as regards the appointment of an agent (*v*). It seems almost indispensable, to meet the common duties and exigencies of corporations created by charters and statutes in modern times, that they should be empowered to enter into contracts, and appoint agents, without the tedious formality of applying the corporate seal. Mr. Justice Story, in his book on Agency, in discussing the tendency of modern decisions to meet altered circumstances, says:—"It affords a beautiful illustration of the expansive power of the common law, which acquires flexibility, and moulds itself from time to time, so as to accomplish the various ends of modern society" (*w*). And Mr. Justice Paterson, in a comparatively modern case (*x*), having referred to the liberal construction the rule has had in America, said:—"The decisions of those courts, although intrinsically entitled to the highest respect, cannot be cited as direct authority for our proceedings; and there are obvious circumstances which justify their advanc-

(*s*) Co. Litt. 66 b.(*t*) Com. Dig. Attorney C. 2.

(*u*) *East London Waterworks Co. v. Bailey*, 4 Bing. 283. *Arnold v. Mayor of Poole*, 2 Dowl. (N.S.) 574.

(*v*) *Murray v. East India Co.*,

5 B. & A. 204, 210; and see 12 & 13 Vic., chap. 106, s. 14.

(*w*) Story on Agency, s. 53.

(*x*) *Beverley v. Lincoln Gas Co.*, 6 A. & E. 829.



ing with a somewhat freer step to the discussion of CH. V., § 78. ancient rules of our common law than would be proper for ourselves." And in coming to the decision, he did not consider he was altering the law, but as justified by the progress of previous decisions in this country and in America. They had to deal with a rule established in a state of society very different from the present, at a time when corporations were comparatively few in number; and upon which it was very early found necessary to engraft many exceptions. It could not be contended, now-a-days, if a person were to act openly as a cashier of a bank, with the knowledge and assent of the directors, but that his acts would be obligatory upon the bank, although there might be no written note on record to establish his appointment (*y*).

(78.) Wrongs committed by servants of a corporation, are subject to the same remedies as in the case of private individuals. The master is always liable to third persons, for the misfeasances, negligences, and omissions of duty, of his servant, in all cases within the scope of his employment (*z*); and this principle extends to corporations (*a*). A distinction, however, seems to have been made between a misfeasance and a nonfeasance. Misfeasance is a positive wrong, as the improper performance of some lawful act; nonfeasance is a negligence. The former, no superior can give authority to commit (*b*); but recent

Corporation  
liable for  
nonfeasance  
and  
misfeasance.

(*y*) *Yarborough v. Bank of Eng.*, 16 East 6; *Roe dem Dean of Rochester v. Pierce*, 2 Camp. 96; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815.

(*z*) Paley on Agency, 396; Com. Dig. Action, A. 2.; *Randle-*

*son v. Murray*, 3 N. & P. 239; 8 A. & E. 109.

(*a*) *Yarborough v. Bank of Eng.* 16 East 6; *Smith v. Birmingham Gas Coy.*, 1 A. & E. 526.

(*b*) *Stephens v. Elwall*, 4 M. & S. 259; *Farebrother v. Anstley*, 1 Camp. 343.

CH. V., § 79, authorities go to show that a corporation may be liable  
 80. for either (c).

Liability for  
 acts of their  
 servants, but  
 not for the  
 acts of  
 contractors.

(79.) There is a difference, however, in the law as to damage occasioned by the act of a contractor, and of a servant of a corporation; and it has been held that a municipal corporation, employing their own servants, and not a contractor, to execute works under the powers of a local Act, were responsible for damage done by the negligence of their workmen. *Alderson, B.*, remarking that the liability of commissioners might be got rid of, by their making contracts; but that, if they employed their own servants to do the work, they would be liable for the act of such servants (d).

Appearance  
 by attorney.

(80.) Although in some cases it is necessary that the agent or the attorney of a corporation should be appointed under seal, yet it does not follow that third parties can raise the objection, that this formality has not been complied with. The court is bound to assume, when a professional gentleman says he appears on behalf of certain persons, that he is properly authorised in that behalf (e). Nor can such an objection be relied on by a defendant when sued for rates (f). Where an Act of Parliament, creating a corporation, provides that the directors may appoint or displace any of the officers of their body, the appointment of an attorney (g) need not be under seal, nor that of the

(c) *R. v. Birmingham and Gloucester Railway Co.* 3 Q.B. 223 as to nonfeasance; *R. v. Great North of England Railway Co.*, 9 Q.B. 315; 2 Cox C.C. 70, as to misfeasance. *Collins v. Middle Level Commissioners*, L.R., Weekly Notes, 8th May, 1869.

(d) *Scott v. Manchester*, 1 H. & N. 59.

(e) *R. v. Call*, S.C.V., N.C. 15; 6 W.W. & A'B., L. 216.

(f) *Robertson v. Council of Huntly*, S.C.V. 14-9-66.

(g) *R. v. Justices of Cumberland*, 17 L.J., Q.B. 102; 5 D. & L. 431.

town clerk (*h*), as his services are necessarily incidental to the very object for which the corporation was established; and the same is true of a manager of a company (*i*). A license, however, granted by a corporation must be under seal (*j*). CH. V., § 81-83.

(81.) The incorporation must be proved (*k*). But when the incorporation should be traversed by plea, it need not be proved unless put in issue by the plea *l*). The members of a corporation have no estate whatever, in the property, real or personal, of the corporation. They are distinct persons (*m*). Distinction between the corporation and the persons composing it.

(82.) A distinction is made between public and private corporations. A company constituted by an Act of Parliament is, on the ground of public policy, forbidden to exceed its powers, even though all the shareholders should so agree; whereas a company constituted by deed of settlement, may exceed its powers, provided all the shareholders agree (*n*). Public and private corporations.

(83.) Where a public trust is to be executed by a definite number of persons, it must be executed at a meeting where a majority is present, unless there be usage or custom to the contrary (*o*). A private trust must be executed by all. Where the Legislature has How the corporate business should be managed.

(*h*) *R. v. Municipal Council of East Collingwood*, 1 W. & W., L. 1.

(*i*) *Royal Standard Co. v. Wood*, 3 W. & W. & A'B., L. 85.

(*j*) *Kettle v. McIntyre*, 2 W. & W., L. 21.

(*k*) *Australian Trust Co. v. Duff*, S.C.V. in Equity, 6-6-67; *R. v. Dickson*, A.R. 28th June, 1867.

(*l*) *Bank of N. S. Wales v.*

*Moyston Coy.*, A.R. 30-10-67; *Same v. Undaunted G. M. Co.*, 1 A.J.R. 131.

(*m*) *Acland v. Lewis* 7 Jur. (N.S.) 421, 30 L.J. C.P. 29; *Bulmer v. Norris*, 9 C.B. (N.S.) 19; 30 L.J., C.P. 25. *Bligh v. Brent*, 2 You. & C. 268.

(*n*) *Lee v. Robinson*, 1 W. & W., Eq.\*374.

(*o*) *Blacket v. Blizzard*, 9 B. & C. 857.

CH. V., § 84. not expressly provided, the general rule of law ought to prevail; and in *public trusts*, the majority present at any legally convened meeting, may act in all public matters (*p*). The majority, however, must meet, and a majority of those who meet must concur (*q*). A borough or shire council would come under the denomination of a public trust. A mining company may be considered as a private trust. The law appears to allow a greater latitude in matters of form, as distinguished from the exercise of powers, to a public trust, than to a private one. Indeed, no latitude at all appears to be allowed to private trusts. It is thought that the directors of companies, having the charge and management of associations for private gain, should adhere strictly to the provisions of the rules laid down by the shareholders for their guidance.

Corporations are bound to keep within the scope of the law creating them.

(84.) As every agent having specific instructions, should not be permitted to travel beyond them, so there are yet stronger reasons for insisting that the provisions of the Act, under which the corporation was created, should be closely followed. It is only necessary, here, to deal with corporations as parties to a cause, and to distinguish between them and ordinary suitors, pointing out their capacities and incapacities, their powers and disabilities; distinguishing at the same time those whose aim is to benefit the public, and those whose sole object is the accumulation of wealth for the members of the body corporate.

(*p*) *R. v. Whittaker*, 9 B. & C. 648.

(*q*) Per Baily, J., *R. v. Whit-*

*taker*; and see *Grindley v. Barker*, 1 B. & P. 229; *Cook v. Loveland*, 2 B. & P. 31.

## CHAPTER VI.

### BY-LAWS AND REGULATIONS MADE BY CORPORATIONS.

(85.) WE shall now consider the powers possessed by corporations and companies respectively, in the making of by-laws and of rules. A corporation may make a by-law without any express power being given by its charter (*a*). Every by-law must be *legi fidei rationi consona* (*b*), and a by-law cannot superadd a qualification to an elector, which the charter does not require (*c*). A corporation by charter (and it makes no difference if created by statute) (*d*), cannot make by-laws inconsistent with the intention, or as counteracting the directions, of their charter (*e*), or contrary to the law of the land, or the provisions of the Municipal Corporations Act.

CH. VI., § 85,  
86.  
Legislative  
powers of  
corporation.

(86.) To avoid a by-law on the ground of contemplated inconvenience, the inconvenience must appear probable (*f*); but if no inconvenience is likely to result, as a by-law (although restraining the franchise), which confined to aldermen the power of appointing freemen, before possessed by the corporation at large, such by-

By-laws.

(*a*) 10 Co. 31 a; Hob. 211; Com. Dig. By-law; 5 Co. 63 a; *Child v. Hudson Bay Company*, 2 P. Wms. 209.

(*b*) 8 Co. 126; Com. Dig. By-law, B. I.

(*c*) *R. v. Tappenden*, 3 East. 186.

(*d*) *Kirk v. Nowell*, 1 T.R. 118; *Blacket v. Blizard*, 9 B. & C. 857.

(*e*) *R. v. Cuttrush*, 4 Burr. 2204; *R. v. Breton*, 4 Burr. 2267.

(*f*) *R. v. Ashwell*, 12 East. 22; per *Ld. Ellenborough*, C.J.



CH. VI., § 87, law would be upheld (*g*). A by-law is bad, which  
 88. gives a voice in the election to any person outside the corporate body, to whom it was not given by the constitution of the borough (*h*).

By-laws *ultra vires*.

(87.) By-laws in restraint of trade are bad; but particular restraints either as to time or place, are good, if for a sufficient consideration (*i*). For instance, a by-law prohibiting butchers or other persons slaughtering within the city of Exeter, under certain penalties, was good, as not being in restraint of trade, but only a regulation of it (*j*). A by-law may impose a reasonable charge, when he upon whom it is levied, receives some benefit from the by-law (*k*). Without the authority of Parliament, a by-law cannot bind a stranger to the corporation (*l*), unless it be for the prevention of fraud or corruption (*m*); but all inhabitants within the limits of a corporation, though they be not corporators, are amenable to the laws made for the good government of the place (*n*). A by-law cannot take away a right, or impose any unreasonable restraint in the exercise thereof (*o*).

By-laws in restraint of trade.

(88.) A by-law for the total restraint of a person's rights, will be void (as if a man be debarred the use of his land) (*p*); or for the imposition of a charge, without any apparent benefit to the party, (as "all coming to market pay sixpence per day for standing there,") is void (*q*). A by-law, not reasonable in any respect, will be void; for example, the empowering the administration of an

(*g*) *R. v. Bird*, 13 East. 367 ;  
6 T.R. 732.

(*h*) *Ibid.*

(*i*) Willes, 384.

(*j*) Cowp. 269.

(*k*) 5 Co. 64 a; 1 Rol. 363,  
L. 50; 5 Mod. 319.

(*l*) 2 Vent. 33, per *Curiam*.

(*m*) 1 Bulst. 12.

(*n*) Cowp. 270.

(*o*) Rawl. 159; Arn. 18.

(*p*) Sav. 74; *O'Malley v. Ward*, 1 W. & W., L. 277.

(*q*) Com. Dig. By-law, C. 5.



oath to a person not obliged to take one (*r*). A by-law may be good in part, and bad in part, but that can only be the case where the two parts are distinct from each other; thus, if a by-law consists of several distinct and independent provisions, although one or more of these may be void, yet the rest of the by-law may be valid (*s*). But if a by-law be entire, and one part be void, it is void altogether (*t*); and if it be unreasonable in any particular, it will be void for the whole; as if a penalty to be enforced, be unreasonable or uncertain, or to be levied by imprisonment, or by distress and sale (*u*). If power be given to inflict a specific punishment, none other can be inflicted (*v*).

(89.) Corporations created by Act of Parliament, are upon the same footing with, and stand in no better position than, those created by charter. Neither can (unless express power be given them) make by-laws to create a forfeiture. And a by-law imposing a penalty, (which may be lawfully done under it), or levying a fine, cannot authorise the withholding profits until the fine is paid, for, as was remarked by *Lord Ellenborough*, it would be "imposing a penalty upon a penalty" (*w*). But a by-law may be made, imposing a penalty to be recovered by action of debt (*x*), but it cannot give the right to sue for the penalty, to any other than the corporation (*y*). Nor can a by-law impose imprisonment

Corporations created by statute are on same footing as those created by charter.

(*r*) Str. 537; *Waite v. Garston Board of Health*, 37 L.J., M.C. 19; *Elwood v. Bullock*, 6 Q.B. 384; 13 L.J., Q.B. 330.

(*s*) 8 T.R. 356, per Kenyon, C.J., *R. v. Fishermen of Faversham*; *R. v. Lundee*, 31 L.J., Q.B. 244; and Arn. 23.

(*t*) *Dodwell v. Oxford*, 2 Vent. 34.

(*u*) 2 Vent. 183; *Adley v.*

*Reeves*, 2 M. & S. 53, 60.

(*v*) *Hutchins v. Player*, Moore 41; 1 T.R. 118.

(*w*) *Kirk v. Newell*, 1 T.R. 118; Ang. on Cir. 398; *Jenkins v. Speed*, 6 W.W. & A'B., L. 225; N.C. 67; *Adley v. Reeves*, 2 M. & S. 60.

(*x*) 5 Co. 64 a; 1 Rol. 366, L. 46.

(*y*) 2 Wils. 266.

CH. VI., § 90. (z); and no by-law can be retrospective in its operation (a). Every by-law can be repealed, or newly modelled, by the body which enacted it, by a new law made for that purpose; but such latter must be passed in accordance with the necessary formalities (b). By-laws can only be enforced if the parties, for whose benefit they are made, keep themselves in a condition to enforce them (c), and if they are not *ultra vires* (d). Neglect to comply with by-laws, is a breach of duty, but that does not necessarily incur a forfeiture (e).

Construction  
of by-laws.

(90.) By-laws are subject to the same laws of construction as statutes (f), and we shall now proceed to consider how by-laws may be proved. This subject might more properly come in the chapter on Evidence, but doubtless will be more convenient here. And, first, with respect to by-laws under the Boroughs and Shires Statutes. The mode may have been different under the repealed Municipal Acts, but it is not now necessary to consider that question.

By-laws, how  
proved under  
the Shires  
Statute.

The mode of proving by-laws under the Shires Statute, No. 358, sec. 187, is by a copy certified under the hand of the secretary of the shire, professing to be "a true copy, and to have been duly notified as required by the Shires Statute." Such copy is to be evidence of such by-law, and of its contents; and of its having been notified to the inhabitants, as required by section 190. The section does not go on to say that

(z) Com. Dig. By-law E.

(a) 1 T.R. 118; *Bond v. Watson*, 4 W.W. & A'B., M. 85; *Hunter v. Aratravald*, 3 W.W. & A'B., M. 59

(b) *R. v. Ashwell*, 12 East. 22; *R. v. Bird*, 13 East. 367.

(c) *Jennings v. Gt. Northern Rly. Co.*, 35 L.J., Q.B. 15.

(d) *Dearden v. Townsend*, 35 L.J., Q.B. 98; *Everett v. Grapes*, 3 L.T. (N.S.) 669.

(e) *United Band of Hope Co. v. Miners' Racecourse Co.*, before Ch. Judge of Court of Mines, 27-11-66.

(f) *Hunter v. Aratravald*, 3 W.W. & A'B., M. 59.

it shall be evidence of its having been "forwarded to a law officer of the Crown," and that he had certified that it was not contrary to law; and of its publication in the *Gazette*. Yet all these, according to *Taylor on Evidence*, would seem to be necessary (g). Perhaps the safer course would be, in addition to production of the copy certified by the secretary, to produce also the *Government Gazette* containing the by-laws, as certified to by a law officer.

(91.) Under the Boroughs Statute, No. 359, sec. 168, by-laws may be made, adopting any portion of the Twelfth Schedule of the Act, by any borough not within eight miles of the corporate limits of Melbourne or Geelong. When any portion of the Twelfth Schedule has been adopted, so much of the existing by-laws in force "which shall be inconsistent with, or repugnant to, such portion of the Twelfth Schedule, so adopted, or which shall, *in any respect*, deal, or purport to deal, with the subject-matter" of such portion of the Twelfth Schedule, "or any part thereof, shall be deemed to be, and shall be, repealed." And when the fifth part of the Twelfth Schedule has been adopted by any borough, any portion of which is in the parish of North Melbourne or in the suburb of Newtown, commonly called Collingwood, the Melbourne Building Act (h), shall be, with respect to such borough, repealed.

(92.) Before a by-law made previously to the Act No. 359, can be adjudicated upon, care must be taken to ascertain whether any by-laws have been made by the borough, adopting any part of the Twelfth Schedule; and if so, whether there is any repugnance or inconsistency that would repeal the old by-law.

(g) *Tay. on Ev.*, p. 1418.

(h) 13 Vic. No. 39, 1 Adamson 88.

By-laws previous to Boroughs Statute.

CH. VI., § 91, 92.

CH. VI., § 93,  
94. In addition to adopting, by by-law, any portion of the Twelfth Schedule, borough councils may make other by-laws, as prescribed by section 174. The by-law may contain the imposition of reasonable penalties, not exceeding ten pounds, for any offence; but every by-law must be so framed as to allow the justice to order only a part of the penalty to be paid, if he think fit.

Penalties  
imposed by  
by-law.

(93.) A mode of proving by-laws, is provided by section 189, similar to that referred to, *ante*, § 90.

Offences against by-laws, are made offences against the Act, and the penalties and fines go to the borough fund (sec. 190).

When there is no special provision to punish any wilful act or default contrary to the Twelfth Schedule, or any lawful by-law, the person offending is liable to forfeit a sum not exceeding £10 (sec. 191).

The words "the proper officer of the council," in the Twelfth Schedule mentioned, are interpreted to mean any officer or person "duly charged by the council in that behalf" (sec. 194).

Regulations.

(94.) Before leaving this branch of the subject, it would be perhaps more convenient to refer here to the regulations "which borough councils are authorised to make, under the 179th section of the Act No. 359."

The same remarks apply to regulations, as to by-laws, and they may be "passed, made, published, approved, and allowed, and come into operation, and may be rescinded in like manner as by-laws," subject to certain qualifications. No penalty shall be imposed by a regulation. They need not be published at length, in the *Government Gazette*; but a notice, that such

regulation (describing it by its title) has been passed, CH. VI., § 95. and is deposited for inspection at the town hall, and that a certified copy of such regulation shall be sold to any person for one shilling, is sufficient.

The councils of two or more boroughs may make joint regulations (sec. 180); and the councils making them may also repeal them (sec. 183).

(95.) Regulations are proved with the same formalities as by-laws (sec. 189). Regulations,  
how proved.

The Governor-in-Council may, by publishing a notice in the *Gazette*, "rescind any by-law or regulation whatsoever."

The several acts providing for the government of the City of Melbourne and the Town of Geelong, also give power to the corporations respectively, to frame by-laws (*i*).

A very general power is given, under the 6 Vict. No. 7, sec. 91, to make by-laws and regulations for the good government of the said city and town. Such by-laws must be made, only at meetings where two-thirds of the whole council at least are present. The maximum fine must not exceed £10 (*j*), and the by-laws so made shall not come into force until forty days after a sealed copy shall have been sent to the Governor, and affixed to the outer door of the town hall; nor if disallowed in

<p>(<i>i</i>) 6 Vic. No. 7, sec. 91 (4 Vic. Stat. 171); 6 Vic. No. 18, sec. 6 (4 V.S. 184); 8 Vic. No. 12, sec. 25 (4 V.S. 191); 11 Vic. No. 77, sec. 8 (4 V.S. 198); <i>Ibid</i> sec. 19 (4 V.S. 200); 27 Vic. No. 178, sec. 50 &amp; 51 (4 V.S. 221); <i>Ibid</i> sec. 56</p>	<p>(4 V.S. 223); 13 Vic. No. 14, sec. 2 (4 V.S. 231); 13 Vic. No. 39, sec. 8 (4 V.S. 235); <i>Ibid</i> sec. 45 (4 V.S. 259). (<i>j</i>) 6 Vic. No. 7, sec. 91 (4 Vic. S. 171); 11 Vic. No. 17, sec. 8 (4 Vic. S. 198).</p>
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CH. VI., § 95. the meantime by the Governor. The by-laws are not to be repugnant to that Act, or to the general spirit and intendment of the laws in force in the colony.

Breaches of  
by-laws.

Breaches of such by-laws are made punishable upon summary conviction, in like manner as under the provisions contained in the Act, relating to other offences (*k*).

(*k*) Sec. 92, 6 Vic. No. 7.

## CHAPTER VII.

### EXTRADITION.

(95.) EXTRADITION is the act of sending, by authority CH. VII., § 95,  
96. of law, a person accused of a crime, to a foreign juris-  
diction where the offence was committed, in order that The  
intercolonial  
law of  
extradition is  
mainly based  
upon the  
international  
law. he may be tried there. It is usually the subject of  
international treaty; but in the colonies we have to  
regard, not only the extradition treaties between the  
mother country and foreign states but also, the laws  
that regulate the extradition of offenders from one  
colony to another. In both cases, reference must  
chiefly be made to Imperial legislation. Colonies have  
no extra-territorial jurisdiction, and therefore all their  
foreign relations can only be lawfully carried on by the  
Imperial Government (a).

(96.) Unless there be a treaty in existence, and a Extradition  
laws. statute adopting it, the extradition of persons will not  
be sanctioned by the law. In no case is extradition  
allowed, when the accused persons were guilty of  
political offences. For instance, England refused to  
give up the Communists to France in 1871; and in  
such cases, the country where the persons are, and not  
whence they fled, is the sole judge of the character of  
the offence. When a claim is made, reference must be  
made to the statute adopting the treaty, and its pro-

(a) See, as to France, 6 & 7 United States, 6 & 7 Vic., c. 76,  
Vic., c. 75, amended by 8 & 9 amended by 8 & 9 Vic., c. 120;  
Vic., c. 120; as to Denmark, 25 29 & 30 Vic., c. 126.  
& 26 Vic., c. 76; and as to the

CH. VII., § 97, visions must be followed strictly, always having a careful  
 98. regard for the liberty of the person who has sought an asylum with us, by presuming his innocence, and only yielding him up, on proof that he has been guilty of the offence with which he is charged, such offence being one of those mentioned in the treaty or statute. The evidence to support the charge, must be such as would satisfy a British court of justice, and not the court of the country whence the accused fled.

(97.) Each treaty that England has entered into, had to be ratified by the Imperial Parliament. As nearly all the treaties entered into, were for a specific period, occasion was taken in the year 1870, to enact a general law upon the subject (*b*). With respect to the colonies, the Imperial Acts 6 & 7 Vic., cap. 34, and 16 & 17 Vic., ch. 118 (5 Victorian Stats., 265), contain the provisions that relate to the extradition of accused persons (*c*).

English  
extradition  
Act.

(98.) The Extradition Act, 1870, repeals, in express terms, the Imperial statutes affecting the existing treaties with foreign powers. A uniform system is substituted, whereby, upon an arrangement having been come to between any foreign state and England, "for the surrender of criminals," an order in Council may be passed, and the provisions of the Act are at once applied.

The 17th section authorises the Act to be extended to the colonies by an order in Council, and when so extended, the Act is to be read as if the colony were substituted for the United Kingdom. The power of the local legislatures to make laws providing for the extradition of criminals, is not interfered with, and the local

(*b*) 33 & 34 Vic., c. 52.

(*c*) Vol. V. Vic. Statutes.

laws, wherever they can be availed of, are left to their operation, independently of the Extradition Act, 1870." CH. VII., § 99.

But for all the purposes of colonial extradition, this recent Imperial enactment will be of little or no consequence. The surrender of offenders, by one colony to another, will still have to be effected under, and in pursuance of, the provisions of the 6 & 7 Vic., c. 34, as amended by 16 & 17 Vict. ch. 118.

Extradition  
between  
different parts  
of the British  
dominions.

(99.) When a felony has been committed in any part of Her Majesty's dominions, whether within the United Kingdom of Great Britain and Ireland or not, and the felon escapes to some other part of the empire, he may be brought back in the following manner:—A warrant must first be issued for his apprehension, in the colony where the offence was committed; this warrant must be backed by a judge of the Supreme Court of the colony where he may be found. Before the judge can back such warrant, he must have satisfactory evidence furnished to him, upon oath or affidavit, that the seal or signature upon the same is the seal or signature of the person having lawful authority to issue such warrant; and in no case can any such warrant be backed, unless it appears on the face of the warrant, that the person accused has committed either treason or felony. Under this warrant he may be apprehended and brought before a justice; and if the latter be satisfied that there is such evidence of the accused's criminality as would "*justify his committal*" (*d*), he may commit him to prison, there to remain until sent back to the colony whence the warrant issued; and, immediately upon the committal of such person, information thereof in writing, under the hand of the committing magistrate, accompanied by a copy of the

Procedure  
and practice.

(*d*) See *Cox v. Coleridge*, 1 B. & C. 49.

CH. VII., § 100 warrant, shall be given to the Governor. Provision is made whereby copies of the depositions, upon which the original warrant was granted, certified under the hand of the justice issuing the warrant, and attested upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the accused. On receipt of the information and copy of the warrant from the magistrate, the Governor issues another warrant authorising<sup>7</sup> the removal of the prisoner to the place where the offence was committed. He must be sent back within two months of his committal, or he would be entitled to his discharge; and if he is not indicted within six months from his apprehension, he is entitled to demand to be returned, free of expense, to the place where he was arrested.

Offence must  
be a felony in  
both  
countries.

(100.) It will be seen that the Act applies only to felonies. In cases where the offence the accused is charged with, may be a felony in one country, though only a misdemeanour in another, difficulties have arisen upon the interpretation of the statute, but it may now be considered settled, that the offence must be a felony according to the law of both countries (*e*).

(*e*) In the case of Charles Windsor, which will be found in 6 B. & S. 530, and 34 L.J., M.C. 165, Windsor was charged with having, within the jurisdiction of the United States, committed forgery, "for that he did feloniously, with intent to defraud the Mercantile Bank, in the City of New York, make certain false and fraudulent entries in the books of account kept by the said bank, whereby the bank was defrauded of 200,000 dollars, contrary to the Statute of New York,"

&c. The prisoner was paying-teller in the Mercantile Bank. His accounts were deficient to an amount over 200,000 dollars. He eluded detection for a considerable time by false entries. He pretended to be sick one day, and left his place in charge of another officer, and fled to England. On discovery of the true state of the accounts, a warrant of apprehension was issued by a judge of New York. He was captured in London, and claimed under the terms of the extradition treaty



(101.) In all cases there must be such sufficient CH. VII., § 101 evidence adduced before the justice, as would “justify *Primâ facie* the committal of the accused.” Justices are not to case to be send out of the colony, persons residing here, unless made out. they are satisfied that a *primâ facie* case is made out, that the accused is guilty of the charge made against him.

and Act of Parliament 6 and 7 Vic. c. 76, s. 1, “forgery” being one of the offences provided for in the treaty. The Court of Queen’s Bench held that Windsor could not be sent back under the treaty, as, although the offence committed was forgery according to the law of New York, it was not forgery according to the law of England, “and the statute or treaty only applied to offences which have some common element in the legislation of the two countries.” The learned Chief Justice Cockburn, in delivering the judg-

ment of the court, said, “That although the offence committed in this case was admitted to be forgery within the New York statute, yet, as it was not forgery according to the law of England, the prisoner was entitled to his discharge.” Mr. Justice Shee, in the same case, said, “The demand for the extradition of a prisoner must be founded on a charge that an offence has been committed by him which satisfies the definition of the offence in the law of both the contracting countries.”

## CHAPTER VIII.

### IMPERIAL LAWS.

CH. VIII.,  
§ 102-105.

(102.) It is important to understand the general principles that give force to Imperial laws in our colony.

(103.) Colonial possessions are acquired by—1. Conquest; 2. Cession under treaty; 3. Occupancy.

Colonies  
acquired by  
occupancy.

The Australian continent was acquired by occupancy. Where an uninhabited country is discovered by British subjects, and is, upon such discovery, adopted or recognised by the Crown as part of its possessions, it is acquired by occupancy (a).

What laws in  
force.

(104.) In the case of a colony acquired by occupancy, the law of England then in being, is immediately and *ipso facto* in force in the new settlement (b), and such colony is not bound by the subsequent legislation of the Crown, for the King cannot pretend in such case to the rights of a conqueror; but the subjects of Great Britain, the discoverers and first inhabitants of the place, carry there with them their own inalienable birthright—the laws of their country (c).

Common law  
of England  
the common  
law of the  
colonies  
acquired by  
settlement.

(105.) The common law of England is the common law of the colonies, and such statutes as have been

(a) Clarke Col. Law 21.

(b) 2 P. Wms. 75; 1 Blac. Com.  
107; Stoke, Col. Law 10.

(c) 10 East. 288, *per* Lord

Ellenborough, C.J., *R. v. Inhabitants of Brampton; Thorburn v. Steward*, L.R., 3 P.C. 501-510.

passed in affirmance of the common law, previously to their acquisition, are in force there. But no statutes passed afterwards are binding on their rulers, unless they are particularly mentioned (*d*). When the colonies were empowered to make their own laws, the authority of the Imperial legislature was not thereby abridged (*e*); and the power still remains even to impose taxes on the colonies, if it chooses (*f*). Local Legislatures may take away a right of action within the limits of their authority. "There have been established in our colonies," says *Cockburn, C.J.*, "local Legislatures with plenary powers of legislation; and the same comity which obtains between nations, should be extended to them by the tribunals of England, when their law conflicts with ours in respect of acts done within the ambit of their jurisdiction, even to the recognition of *ex post facto* legislation" (*g*); and it was said that it could not be disputed that it was within the power of the Jamaica Legislature to make an *ex post facto* law (*h*). After a colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to the colony or settlement as it does to the United Kingdom (*i*); and so with respect to colonies acquired by occupancy and settlement, as Victoria (*j*). The common law is the inheritance of all the subjects of the realm.

(106.) The settlers of a colony carry with them only so much of the laws as is applicable to their own What laws not adopted.

(*d*) 2 P. Wms. 75. *Reg. v. Vaughan*, 4 Burr. 2500.

(*h*) *Re Bishop of Natal*, 3 Moore, P.C. (N.S.) 148.

(*e*) 7 & 8 Will. III., ch. 22, sec. 9.

(*i*) Clark on Col. Law, p.p. 8, 514.

(*f*) Per Blackburn, J., in charging the jury in *Reg. v. Eyre*, 1868.

(*j*) *Forbes v. Cochrane*, 2 B. & C. 463, 2 P. Wms. 75.

(*g*) *Phillips v. Eyre*, 38 L.J., Q.B. 121; L.R., 4 Q.B. 225.

CH. VIII.,  
§ 107.

situation, and the condition of the infant colony; such, for instance, as the general rules of inheritance, and protection from personal injuries. The artificial refinements and distinctions incident to the property of a great commercial people, such as the laws relating to police and revenue (such especially as are enforced by penalties), the provisions for the maintenance of the established clergy, the jurisdiction of spiritual courts, the bankruptcy and poor laws, the Mortmain Acts and the game laws (*k*), and a multitude of other provisions, are neither necessary nor convenient for the government of the colonies, and are therefore not in force. What laws shall be admitted, and what rejected, at what time, and under what circumstances, must generally, in cases of dispute, be decided by the Supreme Court (*l*). Penal statutes never pass. They are, by the comity of nations, regarded as local in their application.

Power of  
Imperial  
Legislature to  
make laws in  
colonies.

(107.) Although the authority of the Imperial Legislature to make laws for the colonies, is paramount, yet the exercise of that authority has been subjected to limitations from time to time.

The exercise of the power of taxing the colonies, provoked the revolution in America, which contest ended by the declaration of their independence. The exercise of this obnoxious claim was formally renounced by the 18 Geo. III. c. 12, usually called the "Declaratory Act."

Acts passed since the acquisition of a colony, do not

(*k*) *Attorney-General v. Steuart*, 2 Mer. 143; *Whicker v. Hume*, 7 H.L.C. 124; 28 L.J., Ch. 396; So also the law relating to aliens does not extend to India,

*Mayor of Lynn v. East India Company*, 1 Moore P.C.C. 75.

(*l*) 9 Geo. IV., ch. 83, Blac. Com. 108; Stoke Col. Law 4.

extend to it, unless they appear to have been passed with the intention of being so extended (*m*).

CH. VIII.,  
§ 108.

(108.) The Imperial laws in force in Victoria are the common law, the statute law passed in furtherance of the common law, and the statutes applicable to the condition of the colonists, which were in force in England at the time of the settlement of the colony. To this list must be added those laws and statutes in force within the realm of England at the time of the passing of the Act of 9 Geo. IV. c. 83 (*n*), (that is, 25th July, 1828), which that Act directed "shall be applied in the administration of justice in the courts so far as they can be applied;" and whenever any doubts arise, the Legislature may declare whether any law shall have force; and in default of the Legislature doing so, the Supreme Court may, whenever any doubts arise upon the trial of any information or action, or upon any other proceeding before it, decide as to the applicability of any such laws or statutes. This general provision does not import into the colony, *all* the English statute law (*o*). It did not introduce the Mortmain Act, passed 9 Geo. II., c. 32 (*p*), but it introduced the Statute of Limitations, 1 James I., c. 16 (*q*). It has not introduced positive regulations as to police (*r*), nor the provisions of the Statute of Frauds as to devises of lands (*s*), (the latter statute was introduced into the colonies by means of the New South Wales Act of

Imperial laws  
in force in  
Victoria.

(*m*) 1 Chal. op. 197, 2 id. 202; *art*, 2 Mer. 143; *Whicker v. Com. Dig. Navigation G. 3*; 2 P. *Hume*, 4 Jur. (N.S.) 933; 7 H.L. Wms. 75; 1 Blac. Com. 108; 2 Cas. 124; 28 L.J., Ch. 396.  
Ld. Raymd. 1245, 1246; 2 Salk. (*q*) *Devine v. Holloway*, 14 Moo. 290.  
411; Stoke's Col. Law 5 *et seq.*

(*n*) 9 Geo. IV. ch. 83, s. 24.

(*r*) *R. v. Vaughan*, 4 Burr. 2500.

(*o*) *Per Maule, J., Astley v. Fisher*, 6 C.B. 572.

(*s*) 2 P. Wms. 75.

(*p*) *Attorney-General v. Stew-*



CH. VIII.,  
§ 109, 110.

4 Will. IV.), (t) nor penal statutes (u), nor the Acts relating to aliens (v), nor the Marriage Acts (w), nor the Bankruptcy Laws (x).

*Lex fori.*

*Lex terræ.*

(109.) The laws imported by means of the 9 Geo. IV. c. 83, are what is known as the *lex fori*, as distinguished from the *lex terræ*. Lord Chelmsford, when Lord Chancellor, in delivering the judgment of the House of Lords in *Whicker v. Hume* (y), said "the Act applied only to the laws regulating the administration of justice;" and he appeared to have been guided to that opinion by the words of the Act, that "the laws and statutes in force . . . shall be applied in the administration of justice in the courts," &c.

(110.) The Legislature has not exercised the power of declaring what laws are in force, nor has the Supreme Court been very frequently called to decide upon the applicability of particular laws.

(t) *Williams v. Brynes*, 1 Moo. P.C.C. (N.S.) 154; 8 L.T. (N.S.) 69.

(v) *Blankard v. Galdy*, 2 Salk. 402.

(v) *Mayor of Lynn v. East India Co.*, 1 Moo. P.C. 175.

(w) *Latour v. Teesdale*, 8 Taunt. 836.

(x) *Clark v. Mullick*, 3 Moo. P.C. 252.

(y) 7 H.L.C. 124.

## CHAPTER IX.

### APPEALS TO JUSTICES, AND FROM JUSTICES.

(111.) AN appeal, unlike *certiorari*, is not a common law right; it lies only where it is expressly given by some statute (*a*). The right of appeal must be given by express enactment, and cannot be extended, by an equitable construction, to cases not distinctly enumerated in the statute (*b*). But when a right of appeal has been given generally, that right will not be defeated by mere inference.

CH. IX.,  
 § 111, 112.  


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 Right to  
 appeal.

When the statute does not direct who shall be the respondent, the party to whom the notice of appeal is to be given, is usually deemed to be the respondent.

(112.) In some statutes (the Justices and Local Government Acts, for example) the right of appeal is given to "a person who shall think himself aggrieved." These words mean a person who is *immediately* aggrieved by the act done, and not one who is *consequently* aggrieved (*c*); and when several are authorised to sue and be sued in the name of one, that one suing or being sued, may appeal under the words a "party

Who may  
 appeal.

(*a*) *R. v. Cashiobury*, 3 D. & R. 3 N. & P. 420; *R. v. Rec. of Ipswich*, 8 Dowl. 103; *R. v. Warwickshire*, 2 Jur. 543; *R. v. York-shire Jus.*, 1 Q.B. 325.  
*Mag. Cas.* 485; *R. v. Hanson*, 4 B. & A. 52; *R. v. Jus. of Oxfordshire*, 1 M. & S. 448.

(*b*) *R. v. Jus. of Surrey*, 2 T.R. 509; *R. v. Stock*, 8 A. & E. 405, (*c*) *R. v. Jus. Middlesex*, 3 B. & Ad. 938.

CH. IX., § 113, 114.      "grieved;" and a notice of appeal and recognisance may be given and entered into by him only (*d*).

Appeals to justices.

(113.) Our statute law provides for appeals to justices, as well as from them. In appeals to justices, such as under the Local Government Acts, care should be taken to see that the provisions of the statute, relative to the appeal, have been complied with, otherwise the court would have no jurisdiction to hear the appeal (*e*); as, where notice is required, that it has been given and served (*f*); and that the appeal is brought in the proper court as pointed out by the statute; otherwise the whole proceeding would be irregular. When the statute directed the appeal to be made to the *nearest* Court of Petty Sessions, it was held that no court other than the nearest had any jurisdiction (*g*). And it should always be borne in mind that the appeal can only be had upon those matters, in which the statute authorises it.

Necessity for justices to observe forms.

(114.) The Justices of the Peace Statute, section 145, enables the Court of General Sessions to amend, where objections are taken which, if allowed, would prevent the hearing of the appeal. No such provision exists, with respect to appeals to justices in petty sessions, and therefore care should be taken to bring the cause properly before the bench; for if it is not so brought, the magistrates are powerless to assist the appellant. The 68th, 69th, 70th, and 71st sections of the Justices Act, it is submitted, would not apply to appeals. These

(*d*) *R. v. Surrey Jus.*, 5 A. & E. 701 n.

(*e*) *Williams v. Row*, 1 W. & W., L. 376; *Inskip v. Inskip*, 3 W.W. & A'B., L. 24.

(*f*) *Simpson v. Harvey*, 2

V.L.T. Eq. 242; *Stirling v. Hamilton*, 1 W.W. & A'B., L. 14.

(*g*) *Vicary v. Row*, 3 W.W. & A'B., M. 1; *Robertson v. Shire of Huntly*, S.C.V., 17 Sept., 1866.

sections refer to informations and complaints, not to appeals.

CH. IX.,  
§ 115-117.

(115.) When an appeal was made to justices, under the 25th section of the Pounds Statute, which requires that notice of appeal shall be given at the same time as the cattle are released, it was held that notice given two days after the cattle were released, was bad (*h*). Power of appealing to justices, against the assessment levied by the Mining Board, is given by the Mining Statute (*h h*).

Appeal under  
Pounds Act.

Notice of  
appeal.

Under  
Mining Act.

(116.) An appeal to the Supreme Court is only allowed when a question of law is involved. The Justices Statute gives, in general terms, an appeal to the general sessions in some cases of convictions.

Appeals to  
general  
sessions.

There are several special Acts giving an appeal to the general sessions where justices make an order, as in the case of affiliation and maintenance orders under the Matrimonial Statute. In others, appeals are given from orders made by local bodies, to the general sessions, as in the case of rates under the Boroughs and Shires Statutes, and the fixing the levels of streets. In some instances, the petty sessions is constituted the appellate court, as in the case of rates, and disputes under the Friendly Societies Statute.

(117.) When an appeal is made to the general sessions, against a rate, the forms of the statute should be strictly adhered to. The notice of appeal should be carefully drafted, setting out in detail the grounds of appeal, and that the person appealing is a person ag-

Requirements  
of statute to  
be strictly  
observed.  
Notice of  
appeal.

(*h*) *Parker v. Kelly*, 4 W.W. & A'B., L. 28; but see *Skinner v. Grimwood*, S.C.V. 10 July, 1866.  
(*h h*) No. 291, 2 Vict. Stat. 534.

CH. IX.,  
§ 118.

grieved by the rate (*i*). The grounds of appeal are sometimes very elaborately drawn, each point being stated with great minuteness. This, it is submitted, is scarcely necessary. If enough be disclosed to show the particular objection upon which it is intended to rely, the court would no doubt hold it sufficient. For instance, to say that the rate is "unequal," would be sufficient, without stating in what particular instances—it informs the council that the rate will be attacked on that point; or to say that "the appellant was not liable to the rate," would be sufficient, without stating the reasons why the exemption is claimed.

Grounds of  
appeal.

(118.) It has been held that grounds of appeal such as "I am not guilty of the said offence," or that "the conviction was bad in law," or that "the verdict is against evidence," or that "the decision is contrary to law," open up every defence, both of fact and of law (*j*); and so it has been held by the Supreme Court (*k*), on appeal from a decree of the primary judge in Equity, "that the decree was against evidence," was a sufficient statement of a ground of appeal (*l*).

(*i*) *Corio Rd. Bd. v. Galletly*, 1 W.W. & A'B., L. 85. It is not necessary that the notice should state expressly that the person is aggrieved, if it be clearly deducible from the notice generally, that the person appealing is aggrieved, *Henly v. Hart*, 4 W.W. & A'B. 162.

(*j*) *R. v. Newcastle-on-Tyne*, 1 B. & Ad., 933; *R. v. Jus. of Devon*, 1 M. & S. 410.

(*k*) *Creswick Gd. Trunk Company v. Hassell*, A.R. 20th Sept., 1867.

(*l*) But see decision under 41 Geo. 3 Ch. 23 Sec. 4, which prescribes that the notice shall be in writing, and shall specify the

"particular causes or grounds of appeal," *R. v. Mayall*, 3 D. & R. 383; *R. v. Sheard*, 2 B. & C. 856, 4 D. & R. 480. And see *R. v. Justices of Carnarvonshire*, 1 G. & D. 423, where it was held that, if the facts which constitute the grounds of appeal are more within the knowledge of the respondents than of the appellants, the notice need not be so explicit. The sufficiency of the grounds is exclusively within the jurisdiction of the sessions, *R. v. Kesteven*, 13 L.J., M.C. 78, overruling *R. v. Carnarvonshire*, 2 Q.B. 325, and *R. v. West Riding of Yorkshire*, 2 Q.B. 331.



(119.) The notice of appeal should be proved (*m*).  
 A notice of appeal may be abandoned, and a fresh one given, provided it be in proper time (*n*).

CH. IX.,  
 § 119-121.

The notice  
 should be  
 proved.

(120.) When the notice of appeal has been proved, the cause is launched before the court. The following cases will aid in determining who should begin. Though it may be said that, whatever practice, in this respect, the sessions might adopt, the Supreme Court would not control it (*o*). It has been held (*p*) that, when the appellant alleges that he has no rateable property within the borough or shire, the respondent should first show that he has some property liable to be rated. When the appellant disputes, before the sessions, the *quantum* of the rate, the officers making it, must show to the justices some probable grounds for the amount at which they charge the party in the rate (*q*), and it will not be sufficient for the respondent to show that the appellant is in the possession of some property.

Who begins.

(121.) Where the appellant objected to the rate because others were not rated, and evidence was given by the appellant that some persons were not rated, it was held that it was not the appellant's duty to furnish the means to enable the sessions to amend the rate (*r*). *Abbott, C.J.*, says (*s*):—"Where property is rateable, it is the duty of the officers to include it in the rate, and to take what means they can,

Appeals  
 against rates.

(*m*) *R. v. Hertfordshire*, 1 N. & M. 331.

(*n*) *R. v. Middlesex*, 9 Dowl. 163; *R. v. Yorkshire*, W.R. 3, T.R. 776; *R. v. Cheshire*, 1 Dowl. (N.S.) 570.

(*o*) *R. v. Jus. of Suffolk*, 6 M. & S. 57.

(*p*) *R. v. Newberry*, 4 T.R. 475.

(*q*) *R. v. Topham*, 12 East 546. Even in that case, Le Blanc, J., said that when that naked proposition (who should begin) arises, the court will have no difficulty in dealing with it.

(*r*) *R. v. Hull Dock Co.*, 3 B. & C. 516.

(*s*) *Ibid.*

CH. IX.,  
§ 122, 123.

to ascertain its value. It is not for them to omit it altogether, and to cast upon the appellant what is properly their duty—the burthen of proving its value.” And *Lord Ellenborough, C.J. (t)*, says:—“The question is, whether a person who, I will suppose for the present, is liable to be rated for something beyond 6s. 8d., can be rated to the amount of £250, and then left to pull down the assessment, upon appeal, to the amount which it ought to be? He might as well have been charged to the extent of £50,000.”

Time in  
which to  
lodge appeals.

(122.) The time allowed for making the appeal is in general limited to the *next* sessions after the conviction or act complained of (*u*), or else to the sessions which shall be held after so many days from the conviction or act done (*v*).

The next  
sessions.

The meaning of the *next* sessions has been the subject of much controversy. Generally speaking, it means the “next practicable sessions” after the time when the right to appeal first arose or accrued (*w*).

Practice at  
hearing.

(123.) Where both parties appear, and are ready to proceed with the appeal, the respondent, who in most cases has to begin, may, in strictness, require the appellant to prove the service of his notice of appeal (when one is required to be served or given), and the entering into recognisances, &c., before the respondent opens his case to the court; for unless notice of appeal

(*t*) *R. v. Topham*, 12 East 546  
*et passim*.

(*u*) Act No. 267, sec. 140, 2 V.S.  
266.

(*v*) Local Govt. Act.

(*w*) *R. Jus. Essex*, 1 B. & A.  
210; *R. v. Hendon*, 2 D. & R.

249; *R. v. Sussex*, 15 East 206;

*R. v. Thackwell*, 4 B. & C. 62;

*R. v. Suffolk*, 8 Dowl. 618; *R. v.*

*Jus. Cornwall*, 6 A. & E. 894; *R.*

*v. Jus. Cheshire*, 1 Dowl. (N.S.)

570.

has been given, the court has no jurisdiction to try the appeal (*x*). But the proof of notice may be waived. On a rate case being called on, and the appellant being then ready to prove his notice, the respondents applied to put off the trial until next sessions, which application was granted, on payment of costs, and the respondents' counsel thereupon handed a copy of the notice of appeal to the clerk of the peace, to enable him to draw up the order. At the next sessions both parties appeared, but the respondents objected to the appeal being heard until the appellant first proved service of the original notice of appeal; and he not being prepared to do so, the sessions confirmed the rate. But the Court of King's Bench issued a *mandamus* to the justices, to enter continuances, and try the appeal, holding that, as the respondents had acted upon the notice, further proof was unnecessary, and the justices ought to have heard the appeal (*y*).

CH. IX.,  
§ 124.

(124.) If the sessions last more than one day, they must be adjourned to another, and so on, until the business is finished; if there be no adjournment, the sessions are at an end, and the justices cannot afterwards legally proceed with the business. Thus, an appeal was entered at the sessions for Suffolk, held on the 7th April, and the sessions were then adjourned to the 9th April, at Woolridge, but nothing could be done for want of a sufficient number of justices. On the 11th April a sessions was holden at Ipswich, and adjourned to the 14th at Bury, when the appeal was determined. This was held to be wrong; for, there being no adjournment of the sessions from the 9th to the 11th April, the sessions had no jurisdiction when they determined the appeal (*z*).

(*x*) 2 Bott's P.L. 439; *R. v. Jus. B & Ad.* 561; *Park Gate Co. v. Oxfordshire*, 1 M. & S. 446. *Coates*, L.R., 5 C.P. 634.

(*y*) *R. v. Jus. Hertfordshire*, 4 (*z*) *R. v. Polstead*, 2 Stra. 1262;

CH. IX.,  
§ 125.

It requires the same number of justices to constitute the court and to adjourn it (a); and when it has been adjourned, the clerk of the peace should make a minute thereof in his book.

(125.) When an application was made to a court of quarter sessions, under a particular Act of Parliament, and the sessions then entertained it, but adjourned the consideration of it to a future day certain, before which day the Act of Parliament was repealed, the Court of King's Bench held that the jurisdiction of the sessions was thereby determined, and that they could not proceed any further in the matter (b).

Each  
adjournment  
a continuance.

But where the sessions are adjourned, every adjournment is regarded by the law (c) as a continuance.

*R. v. Hadigham*, Burr., S.C. 112, and see *R. v. West Torrington*, Burr., S.C. 293.

(a) *R. v. Westrington*, 2 Bott's Poor Law Cases 733.

(b) *R. v. Jus. London*, 3 Burr. 1456.

(c) *Ravensley v. Hutchinson*, 23 L.T. 843 (N.S.). Care must be taken to follow the directions of the Statute in each case—*R. v.*

*Brooke*, 9 B & C. 915; *R. v. Jus. Middlessex*, 6 M. & S. 279; *R. v. M'Lachlan*, 3 W. W. & A'B., L. 2., 1 A.J.R. 23; *R. v. Jus. Essex*, 1 B. & A. 210; *R. v. Jus. Surrey*, 1 M. & S. 479; *R. v. Jus. Sussex*, 7 T.R. 107; *R. v. Jus. Bucks*, 2 M. & S. 230; *R. v. Jus. Pembroke*, 2 East 213; *R. v. Jus. Staffordshire*, 5 East 151.

## CHAPTER X.

### SPECIAL CASES.

(126.) When a difficulty in point of law arises upon a trial, a special verdict may be found, subject to the opinion of the court above on a special case. When the justices in general sessions are by law made judges of fact as well as of law, as in appeals, their decision is final, and cannot be reviewed by any court whatever, without their consent. If, however, they feel a difficulty, in general sessions, in the application of the law to the facts in any particular case, they may put those facts into the form of a special case for the opinion of the Supreme Court, and convict or acquit the prisoner, or confirm or quash the order or conviction, subject to such opinion. It is optional with the sessions to state a case. The Supreme Court, on the application of any of the parties, will compel them to do so. When the facts raise no point of real difficulty or doubt, no special case ought to be allowed, as it puts litigating parties to a great and unnecessary expense, besides giving unnecessary trouble to the Supreme Court. On the other hand, refusing a special case when the facts raise a new and difficult point of law, or a point which is doubtful, owing to conflicting decisions upon the subject or otherwise, is very like a denial of justice to one at least of the litigating parties, and is a serious detriment to the administration of justice in such cases.

(127.) The great thing to be attended to, in drawing a special case is to state the facts, and not merely the

CH. X., § 126,  
127.  
When and by  
whom special  
cases may be  
stated.  
Form of  
special case  
by general  
session.



CH. X., § 128, evidence from which the facts are to be inferred. In  
 129. most instances, facts are proved by express evidence; in some, they are to be inferred from circumstantial evidence; and in these latter cases, it is the fact which is to be so inferred which must be stated, and not the circumstances from which it is to be inferred (*a*).

Case  
 insufficiently  
 stated.

(128.) If the case be insufficiently stated, the Supreme Court may send it back to the sessions to be restated; and when sent back, it is sometimes necessary to examine witnesses again, to enable the court of general sessions to amend; sometimes the evidence already taken, as it appears upon the chairman's notes, will be sufficient for the purpose.

Special case  
 stated by  
 justices.

(129.) A special case stated by justices is unlike a special case stated by the general sessions, in some respects. In the former, it is an appeal from their decision; in the latter, the opinion of a superior court is asked by the general sessions for its own guidance upon a doubtful question of law. It is not optional with justices, as it is with the sessions, to state a case (*b*). If a question of law be involved, the justices, if they refuse to state a case, will be compelled to do so; but it is necessary for the intending appellant to show that the determination of justices was erroneous (*c*). The sessions decide the appeal, subject to the opinion of the court on the special case; while the justices must finally decide the question before them, one way or the other, and leave the aggrieved party, if there be one, to appeal to the Supreme Court (*d*). If the question in controversy be one of law, upon the intending

(*a*) *R. v. Bray*, Burr. S.C. 684; *R. v. Page*, 2 Bott's Poor Law 743.

(*b*) Act No. 159; 28 Vic., No. 267, sec 153.

(*c*) *Ex parte Matt*, 1 W. & W., L. 234.

(*d*) *Fitzgerald v. Naylor*, 1

V.L.T. 149.

appellant complying with the requisite formalities, the justices state a case for the opinion of the Supreme Court. The court shall hear and determine the question of law arising on the case, and shall thereupon reverse, affirm, or amend the determination of the justices (*e*); or remit the matter to the justices, with the opinion of the court thereon, or may make such other order in relation to the matter, and also as to costs, as to the court may seem fit. The case may be remitted for amendment, if necessary (*f*). It is the duty of magistrates in petty sessions, stating a case for appeal, to state with care and accuracy every objection taken before them, and their answer thereto; and the Supreme Court will not, without distinct evidence of an omission, assume any omission by them, and send the case back for restatement (*g*).

(*e*) No. 267, sec. 154, 2 V.S.  
269.

(*g*) *Wilson v. Crawley*, 2 W.  
& W., L. 78.

(*f*) No. 267, sec. 156, 2 V.S.  
269.

## CHAPTER XI.

### CERTIORARI.

CH. XI.,  
§ 130-132.

*Certiorari.*

(130.) IN connection with the proceedings before justices, it may be desirable to notice the various methods by which the Supreme Court exercises control over proceedings before them. These are chiefly by *mandamus*, prohibition, and *certiorari*. As the Justices Statute provides specially for prohibition and *mandamus*, *certiorari* only will be considered here.

In what cases  
it issues.

(131.) *Certiorari* can always be obtained (unless expressly taken away by the statute under which the proceedings are laid) to remove a conviction, or order, into the court above, for the purpose of discussing any defects apparent upon the face of such document, or any misconstruction of the statute relating to the offence described therein, or any irregularities in the different stages of the proceedings. But the Supreme Court will not, upon the return of the writ of *certiorari*, rehear the case upon the *merits*; although in certain cases, and under peculiar circumstances, the judges have consented to receive affidavits from both sides, for the purpose of procuring information with respect to collateral or extrinsic proceedings (*a*).

Effect of  
taking away  
*certiorari* by  
statute.

(132.) Many statutes take away the writ of *certiorari*, and the effect of such deprivation of a common law right has been frequently the subject of judicial investigation

(a) *R. v. Jukes*, 8 T.R. 542.

and decision. The general rule is, that the court will not interfere in a case where the *certiorari* is expressly taken away by statute. And even in such cases, the court will refuse to review the case by granting a *mandamus* (b). The Supreme Court will not interfere indirectly where it is prohibited from doing so directly; and where *certiorari* is taken away by statute, a defendant will not be aided in removing the proceedings to the Supreme Court (c), whether there be any other mode of appeal or not (d), unless, indeed, it clearly appears that the proceedings relate to some matter over which the justices had no jurisdiction whatever (e).

CH. XI.,  
§ 133, 134.

(133.) It must be observed, however, that clauses in Acts of Parliament, taking away *certiorari*, however general they may be in their terms, usually affect subjects only, for the general rule is that the Crown is not included in such a restriction, unless there be some clause in the Act to show that the Legislature so intended it (f). This rule does not obtain where it is an "order" that is intended to be brought up. As a general rule, the statutory enactments taking away *certiorari* are construed so as to prevent further inquiry when the proceedings were lawful; but where there has been a total absence of jurisdiction, or where the proceedings show irregularity on the face of them, *certiorari* will issue, notwithstanding the statutory provision (g).

Right of  
Crown to the  
writ, unless  
expressly  
deprived.

(134.) The English statute, regulating the issue of English Acts applicable as to procedure.

(b) *R. v. Yorkshire Justices*, 1 A. & E. 563. *Justices of Yorkshire*, 5 T.R. 629, and see *R. v. Long*, 1 M. & R. 139.

(c) *R. v. Young*, 2 T.R. 472; *R. v. Casson*, 3 D. & R. 36. (f) Per Buller, J., *R. v. Davies*, 5 T.R. 628; *R. v. Allen*, 15 East 333.

(d) *R. v. Justices of St. Alban's*, 3 B. & C. 698. (g) *Hunter v. Shervin*, 6 W.W. & A'B., L. 26.

(e) *R. v. Justices of Somersetshire*, 5 B. & C. 816; *R. v.*

CH. XI.,  
§ 135, 136.

*certiorari*, has been acted upon in several cases in our Supreme Court, from which it would appear that the enactments of 5 George II. c. 19, and 13 Geo. II. c. 18, have force in Victoria (*h*).

Right of  
Attorney-  
General to the  
issue of the  
writ on  
behalf of the  
Crown, or of  
any  
defendant.

(135.) The Attorney-General is entitled to the writ as a matter of right, either on behalf of the Crown, or of any defendant whose cause he takes up. *Lord Ellenborough* said (*i*):—"I have been inquiring of the officer, if the practice is as I supposed it to be, and find that the Attorney-General has not the power, of himself, to issue a *certiorari*, but must make application to the court; but upon such his application being endorsed, it is as a matter of course with the court to grant the *certiorari*." When a private person applies for a *certiorari*, the application must be supported by an affidavit.

*Certiorari* will not be granted pending an appeal (*j*). The writ may be granted at the instance either of the prosecutor or of the defendant.

Time within  
which writ to  
be moved for.

(136.) The 13 Geo. II. c. 18, sec. 5, requires that the *certiorari* shall be moved for, within six months next after the conviction or order, &c., and that the party suing out the same, shall give six days' notice thereof, in writing, to the justice or justices, or any two of them (if so many there be), by and before whom such conviction, &c., shall be so made. This latter provision is to enable the justices to show cause against the issuing of the *certiorari*, if they be so inclined. The six months begin to run from the date of the conviction, order, or other proceeding to be removed, if there has

(*h*) *R. v. Mollison*, N.C. 11.  
*Re Sara Brazenhall*, 3 W.W. &  
A'B., L. 76.

(*i*) *R. v. Thomas*, 4 M. & S.  
442.  
(*j*) *R. v. Sparrow*, 2 T.R. 196 n.



been no appeal (*k*); and if there has been an appeal, then the time runs from the date of the order of the general sessions (*l*). The notice must be given six days previous to the application for the rule to show cause, and the six days are reckoned, inclusive of one day and exclusive of the other (*m*).

CH. XI.,  
§ 137-139.

(137.) The notice may be of "intention to move for a *certiorari* in six days from the giving of this notice, or as soon after as counsel can be heard" (*n*); but when a notice was given that "the motion would be made on the first day of term, or as soon after as I can be heard," the notice was held irregular, as it was only served on the first day of term, although in fact it was not moved for until after the expiration of the six days (*o*).

Nature of  
notice.

(138.) The rule for a *certiorari* must, according to the Justices Statute, sec. 148, state on its face the objection to be relied on; and as the rule is granted when the application is made after the expiration of the six days' notice, it is deemed advisable that the objections should be stated in the notice.

Objection to  
be stated in  
the rule.

(139.) The notice to be served upon the justices may be in the following form:—

Form of  
notice.

"To H. B. and C. D., Esqs., two of Her Majesty's Justices of the Peace, in and for the, &c., &c.

"Whereas you did, on the                      day of  
in the year of our Lord                      hear a certain infor-

(*k*) *Re Llanbeblig*, 15 L.J.,  
M.C. 92; *R. v. Blowam*, 1 A. & E.  
386.

(*m*) *R. v. Goodenough*, 2 A. &  
E. 463.

(*n*) *R. v. Rose*, 3 D. & L.  
359.

(*l*) *R. v. Justices Middlesex*,  
5 A. & E. 626; *R. v. Justices*  
*Sussex*, 1 M. & S. 631; *R. v. Jus-*  
*tices Hertfordshire*, 2 D. & L.  
952.

(*o*) *In re Florenders*, 4 B. &  
Ad. 865; 3 N. & M. 592.

CH. XI,  
§ 140, 141.

mation [*or* complaint], and take the examinations of  
and and upon such exami-  
nations as aforesaid [*or as the case may be*] did make  
and issue your order [*or* did convict], &c., &c. And  
whereas it appears that [*here state the objections to the  
order, conviction, or other proceeding*].

“I do hereby, according to the form of the statute  
in that case make and provided, give you notice that  
the Supreme Court [*or* a judge thereof] will, in six  
days from the time of your being served with this  
notice, or as soon after as counsel can be heard, be  
moved on behalf of the said for a writ of  
*certiorari*, to issue out of the said court, and to be  
directed to [*the proper officer of the general sessions,  
if it be a record of sessions; or otherwise, to the justices  
in whose possession it ought to be*], for the removal of  
the record of the order [*or* conviction, *as the case may  
be*] into the Supreme Court.

“Dated the day of A.D.  
J. S.  
By his attorney.”

In vacation.

(140.) *Certiorari* may be granted in vacation by a  
judge, and made absolute in the first instance (*p*).

Affidavits  
necessary.

(141.) The application, whether to a court or a  
judge, except when made by the Attorney-General,  
should be supported by an affidavit stating the grounds  
for it. The application is usually *ex parte* (*q*). In the  
case of felonies, the rule granted is only to show cause;  
but in misdemeanours, it is generally absolute in the  
first instance (*r*). When the application is made to a  
judge, and he grants the writ, he marks on the

(*p*) *R. v. Carr*, N.C. 59.

(*r*) *R. v. Spencer*, 8 Dowl. P.C.

(*q*) *Symonds v. Dimsdale*, 2

127, Cor. Cr. Pr. 55.

Ex. 535; 2 Chit. Arch. 1088; 12

Jur. 485.

affidavit "Let a writ issue;" and this *fiat* must be obtained before the writ is issued, or it will be irregular (s). The court will not interfere with the judge's discretion in the granting of a *certiorari*, unless he has been misled by fraud or misrepresentation (t).

CH. XI.,  
§ 142, 143.

(142.) It must be proved, on oath, that the party suing out the *certiorari* gave the six days' notice to the justices, otherwise no writ will be granted (u); and the notice must be given by the party at whose instance the *certiorari* is to be applied for. The writ could not be issued at the instance of any other than the one who has given the notice, although the latter avowedly drops the proceeding, and it be too late to give a fresh notice (v). The notice must state distinctly the name of the party applying for the writ (w), and it may be signed by an attorney on his behalf (x).

Conditions  
precedent  
must be  
proved.

(143.) If two justices convict a man under a statute which gives one justice a power to convict singly, still notice of the application should be served on both justices (y). The affidavit of service of notice should not be intituled in any cause or matter (z), but intituled as before the court or judge, to whom application is made. There must be an affidavit identifying the party applying for the writ, with the party who gave

Affidavits  
should not be  
intituled in  
the cause.

(s) *R. v. Whitechapel*, 12 L.J., M.C. (N.S.) 85. He should also sign the *fiat*, *R. v. White*, 1 Salk, 150.

(t) *R. v. Wilkes*, 5 E. & B. 690; 25 L.J., Q.B. 47.

(u) 13 Geo. II. c. 18, sec. 5.

(v) *R. v. Justices of Kent*, 3 B. & A. 250.

(w) *R. v. Lancashire*, 4 B. & A. 289.

(x) *R. v. Chidingstone*, 7 Jur.

(N.S.) 125. *R. v. Justices of Suffolk*, 18 Q.B. 416; 21 L.J., M.C.

169. *R. v. Justices of Lancashire*, 11 A. & E. 144.

(y) *R. v. Baldwin*, 1 Gude's Practice 222.

(z) *Ex parte Nohro*, 1 B. & C. 267. *Ex parte Wallwork*, 4 D. &

L. 403.

CH. XI.,  
§ 144.

the notice, and it must also appear affirmatively on the affidavit, that the justices to whom notice has been given, are the justices who made the conviction or order. The court will not infer the identity from mere coincidence of names and descriptions in the order and notice or affidavit of service, or from other affidavits (*a*).

Recognisance  
must be  
entered into.

(144.) It is also necessary that a recognisance should be entered into, before application is made for the writ. The 5 Geo. II. c. 19, sec. 2, enacts "that no *certiorari* shall be allowed to remove any such judgment or order, unless the party or parties prosecuting such *certiorari*, before the allowance thereof, shall enter into a recognisance, with sufficient sureties, before one or more justices of the peace for the county or place, or before the justices at the general sessions, where such judgment or order shall have been given or made, or before one of Her Majesty's justices of the Court of King's Bench, in the sum of fifty pounds, with condition to prosecute the same at his or their own costs and charges, with effect, without any wilful or affected delay, and to pay the party or parties in whose favour, and for whose benefit, such judgment or order was given or made, within one month after the said judgment or order shall be confirmed, their full costs and charges, to be taxed according to the course of the court where such judgment or order shall be made; and in case the party or parties prosecuting such *certiorari*, shall not enter into such recognisance, or shall not perform the conditions aforesaid, it shall and may be lawful for such justices to proceed to make such further order or orders for the benefit of the party or parties for whom such judgment shall be given, in such manner as if no such *certiorari* had been granted (*b*). The recognisance

(*a*) *R. v. Justices of Shrewsbury*, 9 Dowl. 501.      11 A. & E. 159.  
(*b*) *R. v. Dunn*, 8 T.R. 216.

should be certified into, and filed in the Supreme Court with the *certiorari* and order or judgment removed thereby. This enactment applies to convictions, although it only mentions judgments and orders (c).

CH. XI.,  
§ 145.

It does not apply to cases where there is no appeal to the sessions (d), nor to cases where the writ is served out by the prosecutor (e).

(145.) The effect of the writ is to remove all proceedings of the nature described therein, which have taken place between the *teste* and return, although the proceedings originated after the *teste*. The inferior court or justices below are bound to obey the writ after production of it, and notice to them, in fact, of such production, when sitting in their judicial capacity; and after that, all further proceedings before them on the matter are erroneous, and *coram non judice* (f). It operates as a *supersedeas*, only from the time of its being actually delivered, and not from the time of its being issued (g); and it will altogether lose its effect if not delivered before the time for its return (h). The justices are bound to stay further proceedings, even if the *certiorari* had been granted against law; for they are not to dispute the command of a superior court, which is a warrant to them (i). And if they go on after the due delivery of the writ, they may be punished by attachment for contempt (j).

(c) Paley on Convictions, 5th Ed. 421.

(d) *R. v. Jones*, 9 Dowl., P.C. 504; and *R. v. Dunn*, 8 T.R. 218 n.

(e) *R. v. Spencer*, 9 A. & E. 485.

(f) *R. v. Battams*, 1 East. 298; *Cross v. Smith*, 1 Salk. 148,

2 Hawk. c. 27, sec. 57. *Mungeon v. Wheatley*, 20 L.J., Ex. 110.

(g) *R. v. Seton*, 7 T.R. 373; *R. v. Chasemore*, 2 Jur. 11.

(h) 2 Hawk. c. 27 s. 59.

(i) Crompt. 129.

(j) 1 Salk. 148; 2 Hawk. c. 27, s. 61.



CH. XI.,  
§ 146.

Return to be  
according to  
the tenor of  
the writ.

(146.) *Certiorari* may sometimes be granted to remove and send up the record itself, and sometimes only the tenor or copy of the record (as the words therein be); and it must be obeyed accordingly, or the return will be bad (*k*). The return of a copy of the record will not do, when the writ is to remove and send up the record (*l*). But a return that the record is returned to the sessions, and that a copy is annexed to the writ, if true, is sufficient; and the justices ought in all cases to return convictions to the sessions, whether an appeal lies or not (*m*). If the *certiorari* be to return the conviction, the examinations and affidavits need not be returned (*n*). But the complaint ought to be returned with the conviction or order (*o*). The return should be made by the party to whom the writ is directed (*p*), and must be on parchment (*q*).

(*k*) 2 Dalt. c. 195; 2 Hawk. c. 27 s. 76.

(*l*) *Palmer v. Forsyth*, 4 B. & C. 401; 6 D. & R. 497.

(*m*) *R. v. Eaton*, 2 T. R. 285; *R. v. Turk*, 10 Q.B. 540; 16 L.J., M.C. 114.

(*n*) *R. v. Turk*, *ubi. sup.*

(*o*) *R. v. Badger*, 6 E. & B. 137, 25 L.J., M.C. 81.

(*p*) *Ashly's Case*, 2 Salk. 479.

(*q*) 1 Barnard 113.

## CHAPTER XII.

### MANDAMUS AND PROHIBITION.

(147.) Writs of *mandamus* and prohibition are the means provided by the common law to compel or restrain inferior jurisdictions, to perform or abstain from performing, some particular act. As a general rule, *mandamus* will not issue at common law, unless, to compel the performance of some statutory duty, and then only when no other specific remedy is provided and the application must be made without delay. The issuing of the writ is altogether discretionary, and no proceeding in error lies upon it.

CH. XII.,  
§ 147-149.  
*Mandamus.*

(148.) Prohibition will only issue, at common law, to restrain justices from proceeding, or further proceeding, with a matter over which they have no jurisdiction, it being a remedy provided by the common law against the encroachment of jurisdiction. The distinction between prohibition and *certiorari* is, that the former issues when there was no jurisdiction at all, the latter issues when there was jurisdiction, but it has been improperly or illegally exercised (*a*)

(149.) The procedure to obtain either of these writs, is somewhat complicated, and the difficulty of satisfying the requirements of the law, in order to show that the applicant is entitled to the remedy, frequently prevents its employment.

(*a*) Lloyd on Prohibition, *passim*. *Reg. v. Pohlman*, A.R. 3rd Sept., 1868.

CH. XII.,  
§ 150, 151.

The Justices Statute, however, provides a ready and simple means of either compelling justices to proceed, or restraining them from proceeding, when application is made to the Supreme Court by an aggrieved suitor.

Statutory  
*mandamus*.

(150.) Section 138 of the Act No. 267 enables any person to apply to the Supreme Court for a rule calling upon the justice to show cause why he should not do some act which he had refused to do. The party to be affected by such act must be served with, and made a party to, the rule (b). It is incumbent on the applicant to show that the justice had jurisdiction to do the act which he refused to do (c). The application should be supported by an affidavit, and may be made to the court or a judge, but cause must be shown to the court only.

Against  
justices.

(151.) Any person aggrieved by the summary conviction or order of a justice may, within a month after the conviction, or making of the order, upon showing by affidavit a *prima facie* case of error or mistake on the part of the justice, apply to the court or a judge, for a rule (when the application is made to the court), or for an order (when made to a judge), calling upon the justice, or the party interested, to show cause to the court why they should not be prohibited from further proceeding in the matter (c c).

Error or  
mistake must  
be shown.

It will be seen that the party must be aggrieved by the conviction or order; and until the conviction or order is drawn up, a prohibition will not issue (d).

As there must be a *prima facie* case of error or

(b) *Reg. v. Parton*, A.R. 28th June, 1869.

(c) *Hackett, in re, ex parte Wilson*, 2 V.L.T. 257.

(cc) Justices of the Peace Statute, No. 267, sec. 136.

(d) *Hackett v. Simpson*, A.R. 21st March, 1865.

mistake on the part of the justice, the Supreme Court will not grant the rule unless the matter complained of was brought under the notice of the justice (*e*); and where the points were taken below, costs will be awarded (*f*).

CH. XI.,  
§ 152.

(152.) On the return of the rule, if the error or mistake (if any) appears to be amendable, the court shall amend the conviction or order, or may affirm it, or, after considering the evidence adduced before the justice (*g*), if the conviction or order cannot be supported, the court may make such rule or order absolute, with costs. In order to enable the Supreme Court to consider "the evidence adduced before the justice," it is necessary to annex to the affidavits used in making the application the depositions taken before the magistrate, if there were any; and if there were none, then there should be a specification in the affidavit to that effect (*h*). Care must be used to ascertain whether these statutory enactments apply to the case under consideration. If there has been a total absence of jurisdiction, then it could not be said that the justice committed an error or mistake; and in such cases, the application should be for a prohibition at common law. As the latter can only be granted by the full court, it frequently becomes necessary to apply for these writs in vacation. On these occasions, a single judge may exercise the extraordinary power of the court, under what is called the emergency clause. The same remark applies to an application for a common law writ of *mandamus*.

Procedure  
upon the  
return.

(*e*) *Reg. v. O'Brien*, 3 W.W. & A'B. L. 54.

(*f*) *Reg. v. Foster*, 1 W.W. & A'B., L. 8.

(*g*) Sec. 137, Justices Statute, No. 267, 2 V.S. 265.

(*h*) *Reg. v. Hurst*, N.C. 11; *Reg. v. Taylor*, 2 W. & W., L. 153.

## CHAPTER XIII.

### THE EMERGENCY CLAUSE.

CH. XII.,  
§ 153, 154.  
Powers of full  
court  
exercised by  
single judge  
in vacation.

(153.) THE above heading has been adopted because the profession is more familiar with the enactment, 15 Vic., No. 10, sec. 19 (*i*), by that name than by any other. The section referred to, enables a judge of the Supreme Court, during vacation, “if under the special circumstances of the case he shall see fit, to make such orders, and grant writs, as can only, under ordinary circumstances, be made or granted by the court.” Such orders may be set aside by the court, within the first four days of the ensuing term. A judge’s order under this section, must purport to be made under it, and show that the judge intended to exercise the statutable jurisdiction (*j*). An order for a prohibition cannot be made absolute in the first instance (*k*).

Procedure  
and practice  
thereon.

(154.) The proper course for a party seeking an order or writ, in vacation, under this section, is to obtain a judge’s summons, founded upon proper affidavits, calling upon the opposite party to show cause, in vacation, before some judge, why such order or writ should not issue; and on the return of the summons, the judge either dismisses it, or makes absolute the order. The act of the judge, in such matters, in vacation, is the act of the court; and he has power to hear

(*i*) 3 V.S. 621.

(*k*) *Scott v. Riddock*, 2 W. &

(*j*) *Re Brewer ex parte Baker*, W., L. 138.

2 W. & W., L. 136.



and finally determine the matter by such order as he thinks fit to make, subject to its being set aside in term (*l*). The affidavits should make out a case showing "special circumstances" to warrant the judge in entertaining the application. Where an order *nisi* for a *certiorari* was obtained from a judge in vacation, returnable before the full court, it was discharged on showing cause, on the ground that it should have been made returnable before the judge (*m*). In making application to a judge in chambers, during vacation, for an order or a writ, the separate jurisdictions ought to be carefully regarded.

CH. XII.,  
§ 155, 156.

(155.) When the application is for an order in the nature of a *mandamus* or a prohibition, on the ground of some error or mistake on the part of the justices, the provisions of the Justices Statute should be observed. In such cases, the order granted by the judge must be made returnable before the court. On the other hand, if the application be for a *mandamus* or prohibition at common law, or a writ of *certiorari*, the return should be made before the judge, and not before the court.

Procedure  
under statute  
and by virtue  
of the  
common law.

(156.) The court or a judge may grant a *certiorari* at any time, and it may be absolute in the first instance; but when the return has been made to the writ, the proper course to follow would be to obtain a *concilium*, and by that means the cause can be listed in term time, and argued in the usual way on a motion to quash the return, or the rule for the writ, as the case may be.

When  
granted.

A prohibition may be obtained from a common law

(*l*) *Re Brewer, ubi sup.*

(*m*) *R. v. McIntyre*, 4 W.W.  
& A'B., L. 42.

CH. XII., judge, in vacation, during the sitting of a judge in  
 § 157. Equity (n).

Form of  
 judge's order  
 for *mandamus*.

(157.) The following form may be used under the emergency clause:—

“In the Supreme Court.

“*In re* the Acts 15 Vic., No. 10, sec. 19, and (34 Vic., No. 390, and the application of for a publican's license).

“Wednesday, the            day of            , A.D.            .

“Let            a justice of the peace, and a police magistrate of the colony of Victoria,            and            two of Her Majesty's justices of the peace in and for the general sessions, district of            their attorney or agent, attend me, or such other judge of the Supreme Court of the colony of Victoria as shall be sitting in Chambers at the Court House of the said Supreme Court, Latrobe-street, in the said city of Melbourne, at the hour of nine o'clock in the forenoon of            the            day of            one thousand eight hundred and seventy-two, to show cause why, upon reading the several affidavits of            sworn the            day of            and filed herein, and what may be urged by the said justices against the application under the special circumstances of the case set forth in the said affidavits of the said            I, or such other judge of the Supreme Court, should not, in the present vacation, under and by virtue of the provisions contained in the nineteenth section of an Act of the Legislature, made and passed in the fifteenth year of the reign of Her said Majesty, and intituled, ‘An Act to make provision for the better administration of justice in the colony of Victoria,’ make an order that a writ of *mandamus*

should forthwith issue forth of the Supreme Court, CH. XII.,  
directed to the said and com- § 157.  
manding them to [*state order*].

“Given under my hand, at my chambers, in the  
said Court House of the said Supreme Court of the  
colony of Victoria, the twenty-sixth day of

“REDMOND BARRY, J.”



PART II.





THE

# JUSTICES OF THE PEACE STATUTE

(WITH NOTES.)

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THE code of procedure for justices of the peace, known as Jervis' Acts (11 & 12 Vict. chapters 42, 43, and 44), was adopted *in globo* by an Act of the colony of New South Wales, 14 Vict., No. 43, passed 2nd October, 1850, before the separation of Port Phillip from that colony. The latter Act set out Jervis' Acts *verbatim*, adopting them as far as they were applicable, and repealed all Acts repealed by them, and also all colonial Acts of the like tenor and effect. Subsequently the provisions of the English Act, 20 & 21 Vict. c. 43, as to special cases by way of appeal, &c., were substantially adopted by the Victorian Act, No. 159.

The present statute comprises nearly all the provisions of the above Acts, and of 12 & 13 Vict. c. 45 (as to general sessions), together with some not to be found in the English Acts.

Sections 41, 65, and 106 have been amended by the Act No. 319, passed 6th September, 1867.

§ 1, 2. *An Act to Consolidate and Amend the Law relating to Justices of the Peace and Courts of General and Petty Sessions.* [1st June, 1865.

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and the consent of the Legislative Council and the Legislative Assembly of Victoria this present Parliament assembled and by the authority of the same as follows—

Title and  
division of  
Act.

1. This Act shall come into operation on the first day of June in the year of our Lord One thousand eight hundred and sixty-five. It shall be called and may be cited as "*The Justices of the Peace Statute 1865*;" and the sections thereof are arranged in Parts as follow:—

PART I.—Appointment and Local Jurisdiction of Justices ss. 5-14.

PART II.—Courts of General Sessions ss. 15-30.

PART III.—Courts of Petty Sessions ss. 31-51.

PART IV.—Matters preliminary to Examination or Hearing ss. 52-78.

PART V.—Procedure on Commitment for Trial ss. 79-98.

PART VI.—Procedure in Summary Jurisdiction ss. 99-134.

PART VII.—Appeals Mandamus and Prohibitions ss. 135-161.

PART VIII.—Actions against Justices and Officers ss. 162-179

Repeal of  
previous Acts.  
First  
Schedule.

2. Except as hereinafter provided the Acts and parts of Acts mentioned in the First Schedule hereto to the extent to which the same are therein expressed

to be repealed shall be and the same are hereby repealed. § 3, 4.

3. Where before the passing of this Act any offence has been wholly or partly committed, or any warrant or other instrument has been duly made or granted in respect of the same, or any recognizance has been entered into, or any court judge justice or officer has been established or appointed, or any right liability privilege or protection in respect of any matter or thing committed or done before the passing of this Act has accrued, or any action suit or other proceeding in respect of any such matter or thing has been commenced, every such offence shall be dealt with, and every such warrant or other instrument and every such recognizance and every such establishment and appointment and every such right liability privilege or protection shall be of the same force and effect, and every such action suit or other proceeding shall be prosecuted continued and defended, as if this Act had not been passed.

4. The forms contained in the Second Schedule hereto or forms to the same or the like effect may be used and shall be deemed good valid and sufficient in law.

Schedule of forms.

Second Schedule.

11 and 12 Vict. c. 42 s. 28.

11 and 12 Vict. c. 43 s. 32.

(a) This section does away with nearly all the objections formerly taken to the form of justices' orders. "All the old learning on the subject is swept away by the 24th section (of the English Act). No rule is so wholesome as that which prevents technical objections from defeating justice," per Platt, B., *re Allison*, 10 Ex. 561; 24 L.J., M.C. 73; 18 Jur. 1055. The form of conviction given "applies to all cases in which a penalty and imprisonment are imposed." *Per Patteson, J., R. v. Hyde*, 21 L.J., M.C. 94; 7 E. & B. 859 (n); 16 Jur. 337. *Egginton v. Lichfield*, 5 E. & B. 100; 24 L.J., Q.B. 360; 1 Jur. (N.S.) 908, where it was held that the form relied upon, under the above Act, was not applicable to the proceedings in question; but that if the warrant had followed a form given by the Act as applicable

Scheduled forms sufficient.

PART I.,  
§ 5, 6.

to such an instrument, any objection, otherwise fatal to it, would not prevail.

Order must  
show  
jurisdiction.

(b) But an order of justices must show jurisdiction under the statute by virtue of which it is made, *re Timson*, L.R., 5 Ex. 257; 39 L.J., M.C. 129; where a commitment was held bad, stating that the prisoner "did frequent a certain public highway" with intent to commit a felony; the statutable offence being, "frequenting any river, &c., or highway, &c., *leading thereto*." See also *re Peter Mavor*, *Argus*, 6th and 12th September, 1867.

(c) The court will make any reasonable intendment in favour of an order of justices, *R. v. Aire and Calder Navigation*, 2 T.R. 666; *R. v. Farrington*, *ibid.* 471.

## PART I.—APPOINTMENT AND LOCAL JURISDICTION OF JUSTICES.

Governor may  
appoint  
justices.

5. The Governor in Council may from time to time assign such and so many persons as he thinks fit to keep the peace in Victoria or in any part thereof, and may remove any person so appointed.

Removal of  
justices.

(d) Justices may be removed at the pleasure of the Crown; and by implication, by the issue of a new commission leaving out the names of former justices. But until notice, or publishing of the new commission, the acts of the former justices are good in law. The commission remains in force for six months after the death of the Sovereign, unless sooner determined by the issue of a new commission. *Burns' Justice of the Peace*, title "Justice," p. 999 (ed. 1845); 123 (ed. 1869).

Death of  
justice.

(e) The warrant of a justice remains in force until executed, though the justice should die in the interval, *ibid.*

Acts of justice  
not qualified.

(f) Acts done by a justice in a judicial character, before he has duly qualified (*e.g.*, before he has taken the oath) are not void, although he may be liable to a penalty for so acting, *Margate Pier Co. v. Hannam*, 3 B. & Ald. 266.

Mayors and  
mayors elect  
of Melbourne  
and Geelong  
to be justices.

6. The mayors and the mayors elect of the city of Melbourne and of the town of Geelong shall by virtue of their office be justices of the peace of and for



Victoria and (unless disqualified by any law now or hereafter in force relating to the qualification of mayors) during the year immediately succeeding (*g*) that in which they shall have held office. Provided that no such mayor or mayor elect shall during the period for which he shall hold office or the year immediately succeeding thereto sit or act as such justice in any court of general sessions of the peace or of petty sessions holden elsewhere than within the said city and town respectively.

PART I.,  
§ 7.

(*g*) The mayor cannot himself be a returning officer at any election at which he is a candidate for re-election, nor can he become a candidate after the proceedings for filling a vacancy have begun, unless he has refused to act as returning officer, *R. v. Owens*, 2 E. & E. 86; 28 L.J., Q.B. 316. But as he remains councillor for the year following his mayoralty (by 6 Vict., No. 7, sec. 48), notwithstanding the arrival of the time for his retirement by rotation, he would continue to be a justice for the same period. Term of office as justices of mayors of Melbourne and Geelong.

(*h*) The Act of Incorporation of Melbourne, 6 Vict. No. 7, sec. 62 (extended to Geelong by 13 Vict., No. 40, sec. 5), is left unrepealed as to the precedence of the mayors in all magisterial courts within the said city and town. Precedence as justices, of such mayors.

7. The president for the time being of the council of every shire, and the mayor for the time being of every borough, shall by virtue of their office be justices of the peace of and for Victoria, and (unless (*j*) disqualified by any law now or hereafter in force relating to the qualification of president or mayor) during the year immediately succeeding that in which they shall have held office. Provided that no such president or mayor shall during the year in which he shall hold office or the year immediately succeeding thereto sit or act as such justice in any court of general sessions of the peace or of petty sessions holden elsewhere than within the said shire and borough respectively. Presidents of shires and mayors of boroughs to be justices.

(*i*) This section is repealed by the Shires and Boroughs Statutes, 1869, Term of No. 358, sec. 3, and No. 359, sec. 3. But it is re-enacted by sections authority as

PART I.,  
§ 8-10.

justices, of  
other mayors  
and  
presidents.

134 of No. 358, and 117 of No. 359, with this addition—that the president or mayor may be removed from his office of justice by the Governor, at any time, and his powers cease from the date of the notification in the *Gazette*, of such removal.

(j) There is this difference between the position of the mayors of Melbourne and Geelong, and that of the mayors of boroughs, and the presidents of shire councils, as justices. There is no provision in the above statutes, corresponding to that in 6 Vict., No. 7, sec. 48, and 27 Vict., No. 178, sec. 35, for the continuance of the latter as councillors for a year after their term of office, notwithstanding the arrival of the period for their retirement by rotation. If such event happened during their year of office, it would bring them within the disqualification referred to in No. 358, sec. 134, and No. 359, sec. 117, so that such mayor or president would not continue to be a justice during the following year. The latter also are not given precedence in the magisterial courts held within their borough or shire.

Rival  
claimants.

(k) If there be rival claimants for the office, they will both be sworn in by a judge of the Supreme Court, and be left to settle their *status* by proceedings at law, *re Rushall and Delbridge* (borough of Fitzroy).—*Argus*, 23rd November, 1866.

Chairmen of  
general  
sessions to be  
justices.

8. Every chairman of a court of general sessions of the peace shall by virtue of his office be a justice of the peace for Victoria.

Powers of  
police  
magistrates.  
21 & 22 Vict.  
c. 73, s. 1.

9. Every police magistrate (l), except where the contrary is expressly provided, may do alone whatever any two or more justices are by law authorised to do.

Appointment  
of police  
magistrates.

(l) No express authority is necessary for the appointment of police magistrates; the power is inherent in all governments, *ex parte Hargreaves*, 1 A.J.R. 23.

Powers of  
single justice  
in summary  
cases.  
11 & 12 Vict.  
c. 43, s. 29.

10. In all cases of summary proceedings before justices out of sessions upon information or complaint, one justice may receive such information or complaint and may grant a summons or warrant thereon and may issue his summons or warrant to compel the attendance of any witnesses and may do all other necessary acts and matters preliminary to the hearing, even in cases where by the statute in that behalf such

information or complaint must be heard and determined by two or more justices.

PART I.,  
§ 11-13.

11. After the case has been heard and determined, one justice may issue all warrants of distress and commitment thereon; and it shall not be necessary that the justice who so acts before or after such hearing shall be the justice or one of the justices by whom the said case is heard and determined.

Power of single justice to issue warrants of distress and commitment.

12. Where an Act of Parliament requires that any information or complaint be heard and determined by two or more justices or that a conviction or order be made by two or more justices, such justices must be present and acting together during the whole of the hearing and determination of the case.

Where two justices are required they must act together. 11 & 12 Vict. c. 43, s. 29.

13. No justice shall be disabled from acting in the due discharge and execution of his duties as justice in any matter relating to any city town shire road district or borough by reason only of his being a ratepayer or a member of or interested in the concerns of the corporation of any such city town shire road district or borough.

A local justice in general sessions may act in all cases.

One of the fundamental maxims of the law is, *Nemo debet esse judex in propria sua causâ*, 12 Rep. 113—no man can be judge in his own cause. *Broom's Legal Maxims*, 118 (ed. 1864).

(*m*) Justices holding shares in a railway company convicted a man for travelling by a train for which his ticket was not available; the fine went, not to the company but, to the county rate, yet the justices were held disqualified, *R. v. Hammond*, 9 L.T. (N.S.) 423. Justices sitting to hear appeals against the assessment of rates, were interested as having appeals of their own. Held, that though their bias, if any, might be presumed to be in favour of the borough council (the appellants) as against the person rated—they were disqualified, and the party presumably favoured need not accept their decision, *Municipal Council of Prahran v. Clough*, 1 W. & W., L. 238. Justices who were members of a Salmon Fishery Protection Association were held disqualified from hearing a prosecution for a breach of the

Disqualifying interest in justices.

PART I.,  
§ 14.

Salmon Fishery Acts, *R. v. Allen*, 4 B. & S. 915; 33 L.J., M.C. 98. The order will be quashed if any one of the justices hearing the case, be interested in the result, if he join in discussing the matter, even though he withdraw before the decision, *R. v. Hertford Justices*, 6 Q.B. 753; and it is sufficient if he converse with the other justices, though not upon the subject of the adjudication, *R. v. Surrey Justices*, 1 Jur. (N.S.) 1138 (Q.B.).

Waiver.

(n) An objection on this ground may be waived by the party against whom the interest exists, if he know of it at the hearing, and do not object, *Wakefield, &c., v. W. R. & G. R. Co.*, 6 B. & S. 794; 35 L.J., M.C. 69; *R. v. Huntingtower*, 8 W.R., 562 (Q.B.).

What does  
not dis-  
qualify; or  
invalidate  
decision.

(o) Pecuniary interest, however small, in the subject of inquiry, disqualifies justices; but a mere possibility or suspicion of bias does not, unless it be shown to be so real and strong as to be likely to influence their decision, as in the case of near kindred, *R. v. Rand*, L.R., 1 Q.B. 230; 35 L.J., M.C. 157. Where justices who were virtually complainants, sat upon the bench, but took no part in the proceedings or in the decision, and previously announced their intention to that effect, it was held that this did not invalidate the proceedings, though such conduct was improper on the part of such justices, as giving an appearance of partiality to the bench, *R. v. Justices of Tyrone*, 12 Ir. C.L.R. (N.S.) 91; *R. v. London Justices*, 18 Q.B., 421 (n). In a suit, before this statute, for penalties under municipal by-laws, the chairman of the municipality and other ratepayers were held competent to adjudicate as justices, *Jewell v. Young*, 2 W. & W., L. 243. In a suit, after the passing of this statute, for rates accrued due previously, the mayor of the borough was held competent, under this section, to act as justice, *R. v. Ford*, 3 W.W. & A'B., L. 130.

Concern in  
prosecution,  
which does  
not disqualify.

(p) Justices who had ordered a charge to be preferred against their clerk, were held not disqualified, *Wildes v. Russell*, L.R., 1 C.P. 722; 35 L.J., M.C. 241; 14 W.R. 796. Where one of the justices convicting, was a member of the watch committee which directed the prosecution, and the fine went into the funds of the borough council, he was not disqualified, *ex parte Pettitmangin*, 33 L.J., M.C. 99 (n); 4 B. & S. 921.

Summons or  
warrant may  
be served or  
executed  
throughout  
Victoria.

14. When any justice issues a summons or warrant purporting on the face thereof to have been issued within the limits of his jurisdiction, such summons or warrant may be served or executed (as the case may be) within any part of Victoria although beyond the limits of such jurisdiction.



## PART II.—COURTS OF GENERAL SESSIONS.

PART II.,  
§ 15-17.

15. Courts of general sessions of the peace shall be holden in and for such places or districts (*q*) within Victoria as the Governor in Council appoints; and the Governor in Council may from time to time define and appoint the limits and boundaries of the places or districts within which all such courts shall have jurisdiction respectively, and the places and times at which such courts shall be holden.

Courts of  
general  
sessions  
established.

(*q*) Although justices have a district prescribed, within which they are to act, yet, as they are appointed for the colony at large, they would not be liable to an action of trespass for acting elsewhere. Where a certain liberty had justices of its own, the county magistrates were held not liable for acting within it, *Arnold v. Gaussen*, 8 Ex. 463; 22 L.J., Ex. 180.

Justices  
acting out of  
their district.

16. The Governor in Council may appoint a chairman to preside over every such court, and may also from time to time appoint a substitute to perform the duty and exercise the power of such chairman for such time as may be necessary; and every such chairman or substitute shall be a barrister-at-law of Victoria, and shall have practised as an advocate or barrister and special pleader or as either in England Ireland Scotland Victoria or any of them for such period as shall make an aggregate of five years; and every such chairman may be appointed by one commission for several courts or by several commissions for each or any number of such courts; and no such chairman shall undertake the duties of his office until he shall have taken before a judge of the Supreme Court an oath faithfully to execute the duties of his office and also the oath of allegiance.

Appointment  
of chairman.

17. The Governor in Council may from time to time appoint some fit and proper person by whom and in

Power to  
Governor to  
appoint a



PART II.,  
§ 18, 19.

crown  
prosecutor at  
courts of  
general  
sessions.

whose name all felonies misdemeanors and offences cognizable in every such court shall be prosecuted. Provided that nothing herein contained shall be construed to limit or control any authority vested by law in Her Majesty's Attorney-General or Solicitor-General for Victoria.

Private  
prosecutor.

(*r*) If the Crown permit a private individual to carry on a prosecution, it would seem that it should not interfere with the conduct of the cause, unless it will take the case entirely into its own hands, *R. v. Syme*, 2 W.W. & A'B., L. 167, per Stawell, C.J.

Clerk of the  
peace his  
duties.

18. The Governor in Council may appoint for every such court an officer to be called "clerk of the peace," and such and so many other officers as shall appear to be necessary; and every such clerk of the peace or his deputies duly appointed under his hand and seal (and for whose acts he shall be responsible) shall issue all process, arraign prisoners, record verdicts judgments and proceedings of the said court, enter appeals, file convictions and orders of record, and perform all ministerial acts whatsoever necessary to give effect to the decisions of the said court: and may take administer and cause to be taken and administered oaths declarations and affirmations respecting the service verification or attestation of any process of the said court or respecting any other matter or thing arising out of or incident to any proceeding in the said court.

Clerk of the  
peace to give  
security and  
take oath of  
office.

19. No clerk of the peace shall undertake the duties of his office until he have given security to the satisfaction of the chairman of the court to the amount of one hundred pounds for the due execution of the duties of his office by himself and his deputies so appointed as aforesaid, and until he have taken before such chairman an oath (which oath the said chairman is hereby empowered to administer) that he will well

and faithfully execute the duties of his office as such clerk of the peace.

PART II.,  
§ 20-22.

20. No clerk of the peace or other officer of any court of general sessions shall, either by himself or his partner, directly or indirectly be engaged as attorney or agent for any party in any proceeding whatever in such court either in its criminal or civil jurisdiction.

No officer of the court to act as attorney or agent in such court.

21. Every such court shall be a court of record; and shall have and use a seal bearing an impression of the Royal Arms and having inscribed thereon the words "general sessions" with the name of the place where such court is held; and the chairman thereof may take administer and cause to be taken and administered oaths declarations affirmations and depositions in any trial matter examination or other proceeding in such court as occasion may require.

Court to be a court of record and to have a seal.

22. If any person duly summoned to attend as a juror or duly subpoenaed to attend as a witness at any such court in any proceeding neglect to appear and give evidence, or refuse to be sworn or to answer any lawful question without some sufficient excuse, or prevaricate in giving his evidence, or if any person willfully interrupt the proceedings of such court, or conduct himself disrespectfully (s) to the chairman thereof or to any justice while sitting therein, or hinder obstruct or assault any person in attendance on such court or any officer thereof in the lawful execution of his duty, every such person shall be guilty of contempt of court; and the chairman either on his own view or on the oath of some credible witness may punish any person guilty of such contempt in a summary way by imprisonment in any of Her Majesty's gaols in the said colony for any time not exceeding three months or by fine not exceeding fifty pounds; and if such fine be

Punishment for contempt.

Second Schedule, Form i.

Form ii.

PART II.,  
§ 23-25.

not forthwith paid by imprisonment in any such gaol as aforesaid for any time not exceeding three months unless such fine be sooner paid.

Counsel  
punishable  
for contempt.

(s) A court of general sessions has power to fine a barrister who, in the professed performance of his duty, is guilty of a contempt of court. But as it is an inferior court of record, if it treat as a contempt, conduct which is not properly a contempt, the superior court will intervene to protect the person against whom such power is improperly exercised.—*Re Pater*, 5 B. & S. 299; 33 L.J., M.C. 142; 10 L.T. (N.S.) 376. *Re Carroll*, 1 N.S.W.R., at p. 312.

Civil  
jurisdiction.

23. The chairman of the said court and one or more justices of the peace having jurisdiction in the place where the said court is holden, or if no such justice be present the chairman alone, may try hear and determine all appeals and may make all orders and take cognizance of all matters and things cognizable in courts of general and quarter sessions of the peace in England in their appellate jurisdiction; and all appeals to any court of quarter sessions under any Act or statute in force in Victoria shall be made and shall be tried heard and determined under the provisions of this Act to and by any court of general sessions of the peace having jurisdiction in the place where the order or decision appealed from was made or given.

Criminal  
jurisdiction.

24. The chairman of every such court and one or more justices having jurisdiction in the place where the said court is holden, or if no such justice be present the chairman alone, and a jury of twelve men, may inquire of try hear and determine all felonies misdemeanors and offences (except as hereinafter provided) committed within the jurisdiction of such court.

Limitation of  
criminal  
jurisdiction.

25. No such court shall try hear or determine any of the felonies misdemeanors or offences following (that is to say):—

- (I.) Treason misprision of treason murder or any capital felony. PART II., § 26.
- (II.) Offences against the Queen's title prerogative or government or against the legislature of the said colony.
- (III.) Offences subject to the penalties of pre-munire.
- (IV.) Blasphemy or offences against religion.
- (V.) Administering or taking unlawful oaths.
- (VI.) Perjury or subornation of perjury.
- (VII.) Making or suborning any other person to make any false oath affirmation or declaration punishable as perjury.
- (VIII.) Unlawfully and maliciously setting fire to crops of corn grain or pulse or to any part of any wood coppice or plantation of trees or any arson.
- (IX.) Bigamy or offences against the laws relating to marriage.
- (X.) Abduction of women or girls.
- (XI.) Endeavouring to conceal the birth of a child.
- (XII.) Offences against any provisions of the laws relating to insolvents.
- (XIII.) Composing printing or publishing blasphemous seditious or defamatory libels.
- (XIV.) Bribery.
- (XV.) Unlawful combination or conspiracies.
- (XVI.) Stealing or fraudulently taking or injuring or destroying records or documents belonging to any court of law or equity or court with ecclesiastical or admiralty jurisdiction or relating to any proceeding therein.

26. All felonies misdemeanors and other offences cognizable in any such court shall be prosecuted by <sup>Proceeding by</sup> information.

PART II., § 27. information in brief and concise form and all issues of law shall be determined by the said court, and all issues of fact (save in the cases of summary and appellate jurisdiction herein mentioned) shall be tried before such court and a jury of twelve men summoned chosen and returned according to the provisions of the Acts now or hereafter to be in force for regulating juries in Victoria: and every such jury shall be subject to and governed by the same rules regulations and manner of proceeding as are observed upon any criminal trial in the Supreme Court.

Summary  
jurisdiction.

27. If any person being under the sentence of any court having criminal jurisdiction within Victoria escape abscond or absent himself from any gaol factory house of correction hulk stockade or other penal establishment or from the roads or other public works of the colony, or escape from the custody of any gaoler keeper constable guard or escort, or either wilfully disable himself or designedly prevent or protract the cure of any disease complaint or injury from which he is suffering, or feign sickness or be guilty of malinger in order to evade the performance of the servitude to undergo which he has been sentenced, or be charged with the commission while undergoing any such sentence of any crime or misdemeanor whatever not punishable with death, or with any act of drunkenness or other disorderly conduct disobedience or neglect of orders, or with using any abusive insolent or indecent language, every such court may try in a summary way and without a jury any such person so offending; and if he be convicted, may direct that he be forthwith sent back to the custody from which he escaped absconded or absented himself or in which he was at the time of the commission of such offence or to such other custody as the Governor in Council may direct, there to complete the term of his original sen-



tence; and may also direct either that such person be forthwith and whilst undergoing such original sentence subjected to solitary confinement and prison discipline for any period not exceeding one month at any one time or three months in any one year, or that such person in addition to and after the termination of such original sentence be kept to hard labour in irons on the roads or other public works of the colony for any period not exceeding three years.

PART II.,  
§ 28, 29.

28. Every such court shall have power to amend at any time and at any stage of the proceedings any affidavit or title of affidavit notice record decree judgment order writ præcipe process or other proceeding used before or in such court in any matters that appear to such court not likely to mislead in any point essential to the merits of the case, and although there may be no document writing or other matter to amend by; and to impose such terms and to award such reasonable costs of such amendment as it thinks fit.

Power of  
amending.

(t) Including more than one matter in one complaint, is a subject for amendment, *R. v. Cogdon, ex parte Wilkinson*, 2 A.J.R. 84.

29. Where any order is made by any of the said courts of general sessions of the peace, if any person entitled to enforce such order make application and produce a copy of such order under the hand of the clerk of the peace or his deputy and give proof of refusal or neglect to obey such order, the Supreme Court or a judge thereof may direct the said order of the court of general sessions to be removed into the said Supreme Court; and thereupon such order shall be of the same force and effect and may be enforced in the same manner as a rule made by the said Supreme Court; and all the reasonable costs (u) and charges attendant upon such application and removal shall be

Enforcing  
orders of  
sessions.

12 & 13 Vict.  
c. 45, sec. 18.

PART II., § 30. recoverable in like manner as if the same were part of such order.

Copy of judgment sufficient.

If order bad, costs fall with it.

(u) Before this enactment, an indictment lay for disobeying an order of general sessions for payment of costs on the dismissal of an appeal, *R. v. Mortlock*, 7 Q.B. 459; 14 L.J., M.C. 153. An order of general sessions, unlike an order of justices, is the judgment of a court, and sufficient notice is given by showing a copy, *ibid.* The costs were left to be ascertained by the clerk of the peace, and were inserted in the order at an adjourned sitting; though it was doubted whether the justices at the adjourned sitting had jurisdiction to settle the costs, yet as both parties had notice, and did not take any objection, the order was enforceable in this way, *ibid.* An order of general sessions affirming an appeal with costs, where there was no jurisdiction (the notice of appeal having been countermanded), is not enforceable as to costs; but it seems that in such case an order for the costs of the day would have been good, *R. v. Stoke Bliss*, 6 Q.B. 158; 13 L.J., M.C. 151. But under sec. 5 of 12 and 13 Vic., c. 45 (which is not adopted by this Act), giving the court of general sessions power to order the party against whom the appeal is decided, to pay costs to the other upon "any appeal" which should be "brought," it was held that costs might be awarded against the appellant where the appeal was dismissed for want of jurisdiction, *R. v. Padwick*, 8 E. & B. 704; 27 L.J., M.C. 113. This statute does not seem to give so wide a power, as sections 143 and 147 must be taken to relate to appeals over which the general sessions have jurisdiction, and *R. v. Stoke Bliss*, *supra*, applies.

Chairman and justices to make rules for regulating practice.

30. The chairman of every such court and any four or more justices having jurisdiction in the place where such court is holden may from time to time make repeal and alter rules for regulating the practice of the said court in its criminal jurisdiction, and also respecting the entering and hearing of appeals and the fees payable thereon, and for conducting other matters in the said court as to such chairman and justices shall seem meet. Provided that every such rule shall be forwarded by the said chairman to the prothonotary or other proper officer of the Supreme Court and by him laid before the judges of the said court who shall have power to allow or disallow the same; and no such rule shall have effect until one month after it has been so

laid before the said judges nor until it have been published in the *Government Gazette*.

PART III.,  
§ 31.

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### PART III.—COURTS OF PETTY SESSIONS.

31. Any two or more justices assembled and sitting in open court, not being a court of general sessions at any place appointed as hereinafter mentioned, shall be a court of petty sessions (*v*). Provided that in any case where by law two (*w*) or more justices are required to hear and determine the offence or matter of complaint any one justice may if both parties to the proceeding shall in writing entered upon the minutes of the said court (*x*) consent thereto hear and determine the same.

What is a  
petty sessions.

(*v*) It may be contended that a court of petty sessions is a court of record, as by sec. 39 (*post*) it has power to fine and imprison for a contempt. A court of record is a court which has been ranked as such from time immemorial, or has been made such by the express provision of some Act of Parliament, 3 Stephen's Commentaries, 415 (a), ed. 1863. And the very erection of a new jurisdiction with power to fine or imprison for a contempt, makes it a court of record, 3 Broom and Hadley's Commentaries 21; *Groenvelt v. Burwell*, 1 Salk. 200. *Grenville v. College of Physicians*, 12 Mod. R. 388. *Kemp v. Neville*, 10 C.B. (N.S.) at p. 547; 31 L.J., C.P., at p. 162; 7 Jur. (N.S.), at p. 914, the charter creating the jurisdiction in this case, being incorporated in a subsequent Act. And see *Basten v. Carew*, 3 B. & C. 656.

Court of  
record.

(*w*) If the case be heard, and an order be made, by one justice (where two are necessary), it will not be good, though afterwards two justices attend and sign it; and in such case a prohibition was granted, *R. v. —, re M'Laughlin v. Sefton, Argus* (Supplement), Sept. 4th, 1866. See also section 12, *ante*. When other justices come upon the bench during the hearing, if they take part in the proceedings, the witnesses already examined should be re-sworn and re-examined; it is not sufficient that the evidence already taken be read over to them. But an objection of this kind will be waived unless made at the time, *R. v. Jeffreys*, 22 L.T. (N.S.) 786.

One justice  
where two  
required.

Justices not  
hearing all  
the witnesses.

Waiver.

(*x*) Except in cases within this proviso, it seems very doubtful whether a single justice acting in any jurisdiction out of (general) court.

What is a  
court.

PART III.,  
§ 32-35.

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sessions—*e.g.*, in committing a person, in default of bail, for a breach of the peace—can be considered a court, *Conden v. Neale*, 1 C.B. (N.S.) 332; 26 L.J., C.P. 37.

Concurrent jurisdiction.      (y) Different sets of justices having a concurrent jurisdiction in a certain locality for a certain purpose—*e.g.*, hearing applications for publichouse licenses—may all act together; but they may not appoint different sittings for the same purpose. On the first appointment the jurisdiction attaches, and the other set cannot make another, *R. v. Sainsbury*, 4 T.R. 451.

Governor may appoint places for petty sessions.      32. The Governor in Council may from time to time by notice in the *Government Gazette* appoint places at which petty sessions shall be holden, and may revoke any such appointment and may by the same or by any subsequent notice appoint and alter the days and hour of the day when such sessions shall be holden.

Clerk of petty sessions.      33. The Governor in Council may appoint a clerk for every petty sessions; and such clerk shall attend to discharge the duties of his office at the place for which he is nominated and at no other place.

Fees of clerks of petty sessions.  
Third Schedule.      34. Every clerk of petty sessions shall demand receive and take for the use of Her Majesty the several fees allowed by and mentioned in the Third Schedule hereto and no more; and such fees shall be paid in the first instance by the person by whom or on whose behalf the act or proceeding (in respect whereof the same are payable) is required before such act shall be done or such proceedings shall be issued or taken (as the case may be); but no such fee shall be demanded received or taken from any officer of customs or police acting in the execution of his duty or from any person acting for and by authority of Her Majesty or of the central or any local board of health.

List of fees to be exposed.      35. The clerk of every petty sessions shall cause a true and exact printed copy of the said schedule to be



exposed and kept constantly in some conspicuous part of the office or room in which any such fee as aforesaid is demanded taken or received, and also in some conspicuous part of the office or room in which such petty sessions are holden.

PART III.,  
§ 36-39.

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36. If any clerk of petty sessions neglect or omit to keep a printed copy of the said schedule in the places and in the manner in which he ought to keep the same, or if the copy that he keeps be false or inexact, he shall on conviction thereof forfeit the sum of ten shillings for every day during any part of which he makes such default.

Penalty on clerk for failure to expose proper table of fees.

37. If any clerk of petty sessions extort demand take accept or receive from any person any fee gratuity or reward not allowed and mentioned as aforesaid or greater (*yy*) in amount than is allowed and mentioned as aforesaid, he shall on conviction thereof forfeit for every such offence the sum of five pounds.

Penalty for extortion, &c.

(*yy*) To constitute an offence within this section, the exaction must be wilful, and with corrupt or improper intention, *Reg. v. Lloyd, ex parte Munce*, 3 A.J.R. 40. The clerk is personally liable in a civil action for the excess, though he paid the whole into the Treasury, *Cobb v. Munce*, 3 A.J.R. 46.

38. If any person not being a clerk of petty sessions assume or pretend to act as such, or extort demand take accept or receive any fee gratuity or reward under color or pretext of such office, he shall on conviction thereof forfeit for every such offence the sum of ten pounds.

Penalty for pretending to be a clerk of petty sessions.

39. If any person wilfully misbehave himself in any court of petty sessions, or wilfully interrupt the proceedings of any such court, or in the opinion of any justice be guilty of wilful prevarication in giving

Justices may punish for contempt of court.



PART III.,  
§ 40.

Second  
Schedule,  
Form iii.

Adjudication  
of contempt  
not  
conclusive.

Refusal to  
hear an  
attorney in  
contempt.

Jurisdiction  
to be exercised  
immediately.

Apology for  
contempt may  
be accepted.

evidence to such court, he shall on conviction (z) thereof before a justice forfeit any sum not exceeding five pounds, or may be imprisoned for any period not exceeding forty-eight hours; and such person may be forthwith (a) convicted on view by and before the justice in whose presence the offence is committed.

(z) Where a court of record of inferior jurisdiction treats as a contempt, conduct which there is no reasonable ground for so treating, the superior court will intervene to protect the person against whom this power may be improperly exercised, *re Pater*, 5 B. & S. 299; 33 L.J., M.C. 142; 10 L.T. (N.S.) 376; *re Carroll*, 1 N.S.W.R. at 312. The court will support a conviction for contempt, if there be any evidence on which the justices could find jurisdiction, *Reg. v. Mollison, ex parte Faussett*, 3 A.J.R. 26. These courts must be allowed a wide discretion in the *bona fide* exercise of their functions, and the control of their own business and procedure; and the Supreme Court declined to interfere by *mandamus*, where twelve justices had passed a resolution not to hear an attorney until he should have apologised for certain remarks made by him as a borough councillor with reference to the proceedings of the justices; which remarks, the resolution characterised as "a gross, untruthful, and baseless fabrication," *re Fawcner, ex parte McKean, Argus*, March 31st, 1866.

(a) But in the Supreme Court of New South Wales it was decided that justices have no power to refuse to hear an attorney because of a contempt committed by him before them on a previous occasion; their power to punish for contempt must be exercised at the moment—after adjudication that there has been a contempt, *ex parte Cory*, 3 N.S.W.R. 304. In that case some doubt was expressed as to the power of justices to commit for contempt; but that was because there is no such power in Jervis' Acts (which are adopted *in globo* in that colony by 14 Vict., No. 43), as that given in sections 22 and 39 of this statute.

40. Where any person is convicted under the last preceding section of wilful misbehaviour or wilful interruption, if before the rising of the court he make to the convicting justice such an apology for such misbehaviour or interruption as by such justice in his uncontrolled discretion shall be deemed satisfactory, such justice if he think fit may remit such penalty or imprisonment either wholly or in part.

41. If any person complain (except as hereinafter provided) to any justice that any other person is indebted to such complainant in any sum of money not exceeding twenty pounds (b) for any one or more of the following causes of action (that is to say)—

PART III,  
§ 41.

Certain debts  
recoverable  
before  
justices.

For goods (c) sold and delivered:

For money lent: (d)

For work and labour done: (e)

For the use and hire of chattels or beasts:

For work and labour done and materials for the same provided:

For use and occupation of land house or apartments: (f)

For board and lodging:

For feeding and taking care of horses sheep or cattle:

For warehouse room:

For the carriage of goods and chattels:

Second  
Schedule,  
Form iv.

Repealed by  
No. 319, s. 1,  
which follows.

or if any person complain to any justice that any other person has assaulted the complainant (g), any two justices may make an order for payment of the said sum or for so much thereof as shall appear to be due, or for the payment to the complainant by way of damages of any sum not exceeding twenty pounds. Where any complaint is made under this section the summons issued thereon may be signed by the clerk of petty sessions instead of a justice.

1. The forty-first section of "*The Justices of the Peace Statute 1865*" shall be and the same is hereby repealed, and in lieu thereof the following shall from the passing of this Act be and be deemed to be and may be cited as the forty-first section of the said Statute (that is to say):—"If any person complain (except as hereinafter provided) that any other person

No. 319,  
passed 6th  
September,  
1867.

Certain debts  
recoverable  
before  
justices.

PART III.,  
§ 41.

“ is indebted to such complainant in any sum of money  
“ not exceeding twenty pounds (*b*) for any one or more  
“ of the following causes of action (that is to say):—

Second  
Schedule,  
Form IV.

- “ For (*c*) goods and chattels sold and delivered,
- “ For money lent, (*d*)
- “ For work and labour done, (*e*)
- “ For the use and hire of chattels,
- “ For work and labour done and materials for  
the same provided,
- “ For use and occupation of land house or apart-  
ment, (*f*)
- “ For board and lodging,
- “ For feeding and taking care of horses sheep or  
cattle,
- “ For warehouse room,
- “ For the carriage of goods and chattels,

“ Or if any person complain that any other person has  
“ assaulted the complainant, (*g*) any two justices may  
“ make an order for payment of the said sum or for so  
“ much thereof as shall appear to be due, or for the  
“ payment to the complainant by way of damages of  
“ any sum not exceeding twenty pounds. Any com-  
“ plaint under this section may be made to and the  
“ summons issued thereon may be issued and signed by  
“ the clerk of petty sessions instead of a justice.”

Balance of  
larger  
amount.

(*b*) Where the complainant, on the face of the summons or in the particulars of demand annexed thereto, claims more than the amount to which the jurisdiction is limited, the court will not have jurisdiction, though he therein also allow a set-off reducing the claim within the limit, unless the defendant had agreed to such reduction before action, or offered to admit it at the trial, *Arards v. Rhodes*, 8 Ex. 312; 22 L.J., Ex. 106. In that case the Act gave jurisdiction where the debt *claimed* was not more, &c., and the language of this section is substantially to the same effect. An offer to abandon the excess *at the trial* makes no difference, as the claim from the first was one over which the court had no jurisdiction, *ibid.* But see section 44, post. Where there had been no adjustment before action by any

Abandoning  
excess.

person able to bind the plaintiff as to the items credited to reduce the amount within the limit, and no evidence of his consent to treat them as payment on account, it was held that there was no jurisdiction, *R. v. Pohlman, re M'Gaan v. Kearney, Argus*, 10th and 11th September, 1867. *Jenkinson v. Morton*, 1 M. & W. 300. The plaintiff's attorney has no implied authority to abandon the excess, and it cannot be done by amendment of the judge without the authority of the plaintiff, *Hill v. Swift*, 10 Ex. 726; 24 L.J., Ex. 137. But when the sum claimed is within the limit, it is no objection that it is the balance of a much larger amount, which may have to be investigated at the hearing, *Avards v. Rhodes, supra*, and *Parker v. Wood*, 2 A.J.R. 55; *Murphy v. Clarke*, 3 A.J.R. 59; but where the sum claimed, though within the limit, is for damages for a partial breach of a contract, the consideration of which is beyond the limit, there is no jurisdiction, *Brown v. White, Argus*, December 6, 1871, 2 A.J.R. ; *Hogg v. Irving*, 3 A.J.R. 59. But in the above cases, which have reference to the county courts, the Acts give jurisdiction over balances of account; while this section is silent on that point; and it would therefore seem doubtful whether courts of petty sessions have such jurisdiction, unless under the operation of section 44, *post*. If the larger debt has been reduced within the limit by payment, of course there is jurisdiction, *Hancock v. Flannagan, Argus*, 7th July, 1869.

PART III.,  
§ 41.

Abandonment  
by attorney.

Reduction by  
payment.

(c) Shares are not goods, *Knight v. Barber*, 16 M. & W. 66; Goods. 16 L.J., Ex. 18. *Eddy v. Working Miners G. M. Co.*, 2 W.W. & A.B., Eq. 110. Nor are chattels real, *Tuckett v. Alexander*, 1 W. & W., Eq., at p. 92.

(d) Under a claim for money lent, the justices have no power to give interest, *Wilson v. Cranley*, 2 W. & W., L. 78.

Money lent,  
interest.

(e) This comprises a claim for expenses as a witness, though the evidence was not actually taken; but the court discharged an order nisi for prohibition, on condition that the amount should be reduced to that which was legally payable, *R. v. Adams, ex parte Ewart*, 1 A.J.R. 160. Advertising in a newspaper comes under this head, *R. v. Call, ex parte Thomson*, 2 A.J.R. 106. Where work was done, and the defendant had accepted it, the Court refused an order to prohibit the justices from enforcing payment, on the ground that there was a written contract which had not been complied with, *R. v. Lloyd, re Potts v. Cobb*, 1 A.J.R. 78. It is a question of fact for the justices whether a special contract has been rescinded, *R. v. Call, ex parte Thomson, supra*.

Work and  
labour, as  
witness.

Advertising.

Special  
contract.

Rescission.

(f) Rent is not recoverable for a brothel, if the plaintiff was aware that the premises were to be used for such a purpose, *Smith v. White*, Use and occupation.



PART III., § 41, 42. 35 L.J., Ch. 454; 14 L.T. (N.S.) 350; 14 W.R. 510. It is for the justices to determine whether the tenant retained *actual* possession, so as to be liable for use and occupation, *Donne v. Brodie, Argus*, 23rd June, 1869.

Assault.  
Complaint  
by party  
injured,

(g) There must be a complaint by the person injured. Where the complainant did not appear at the hearing, and there was no sufficient complaint in writing—though his attorney appeared and stated that the complaint had been withdrawn by notice—the Court, on *certiorari*, quashed an order of the justices dismissing the complaint; because there was no jurisdiction to adjudicate, *ex parte Hawkins*, 5 N.S.W.R., L. 152. A father may not maintain a complaint for damages for an assault upon his son, a minor; it is not the complaint of the person injured; (the father did not sue as next friend), *R. v. Charles*, 3 W.W. & A'B., L. 52; there is no law by which an infant could sue in his own name, even by next friend, in a police court, *per Stawell, C.J., ibid.* But where the justices dismissed a complaint for assault, on the ground that an infant complainant could not sue without his father as next friend, the Court allowed an appeal, holding also that this was a matter for appeal, and not an interlocutory decision to be dealt with by an order under sec. 138, *Burke v. Smibert, Argus*, 23rd June, 1869. See also Appendix A.

by infant.

Assault in  
assertion of  
title.

(h) Where a general jurisdiction to determine cases of assault was given by statute, but assaults in assertion of title to land were excepted by proviso, it was held that the justices might not go into the question whether the force used was excessive, *R. v. Pearson*, L.R., 5 Q.B. 237.

Money had  
and received.

(i) "Money had and received" is not within this jurisdiction; and where justices made an order against an auctioneer for the price of cows sold by him for the complainant, the Court allowed an appeal, *McCav v. Ryan, Argus*, Nov. 27th, 1863. Nor is a bill of exchange within the jurisdiction, *Wynne v. Barnard, Argus*, April 6th, 1868.

Bill of  
exchange.

Money paid.

(j) Nor is "money paid for the defendant at his request," *R. v. Williams, Argus*, March 24th, 1868; but the Court in that case amended by reducing the sum awarded by the amount of such claim, *ibid.*

Any person  
may appear  
by agent.

42. Every such complainant may appear either personally or by his counsel or attorney (*k*) or by any person in his exclusive employment (*l*) duly authorised (*m*) by writing in that behalf.

Attorney in  
contempt.

(k) Justices are not to refuse to hear a practitioner because of a contempt committed on a former occasion, see section 39 (a), *ante*.



(*l*) A wife may not appear for her husband in the superior courts, PART III.,  
§ 43.  
*Cobbett v. Hudson*, 15 Q.B., 988; 14 Jur. 982.

(*m*) As to an infant suing, whether in person for an assault, or by Wife.  
Infant.  
next friend in a civil complaint—see section 41 (*g*), *ante*.

43. No justices shall have cognizance of any com- Cases  
excepted from  
justices'  
jurisdiction.  
plaint under this Act in any case in which a county  
court has (*n*) not cognizance of an action for the same  
cause, or in any case in which the complainant pro-  
ceeds or the defendant is proceeded against in a repre-  
sentative character (*o*).

(*n*) The jurisdiction of the justices is ousted as soon as it appears Question of  
title.  
that the title to land is in question, as the County Courts had no  
jurisdiction in such cases, at the time when this statute passed. See  
the County Courts Statute, 1865, No. 261, section 22, which was  
passed just before this statute. And even were this not so, this  
statute nowhere gives such a jurisdiction to justices to try cases  
where there is a *bona fide* claim of title, or of a right to do the act  
complained of. A prohibition was granted against a conviction for  
illegally detaining fencing, where a question of title was fairly  
raised, and the jurisdiction was thus ousted, *R. v. Rawlings, Argus*,  
April 2, 1864; *R. v. Webster, ex parte Farquhar*, 1 A.J.R. 153. There  
is no jurisdiction after the question of title is *bona fide* raised, though  
no evidence be offered of it, *R. v. Cridland*, 7 E. & B. 853; 27 L.J.,  
M.C. 28; 3 Jur. (N.S.) 1213. But a *bona fide* belief in a vague general Belief in  
general right  
not enough.  
right in every one to do the act, is not enough to oust the jurisdic-  
tion, *Leatt v. Vine*, 30 L.J., M.C. 207. Where the complaint was for  
committing a trespass and breaking down a fence, it was held that  
the defendant was properly allowed to prove that the complainant's  
lease from the Crown had been forfeited, and that no one had been  
in occupation for two years, *M'Mahon v. O'Keefe*, 1 V.R., L. 125;  
1 A.J.R. 121. For the duty of the justices is to hear and determine Question of  
*bona fides*  
for justices  
upon  
evidence.  
upon the *bona fides* of the claim of right, and if they believe it, to  
dismiss the case on the ground that their summary jurisdiction is  
ousted, *R. v. Dowling, Argus*, Dec. 7, 1866. But they are not to  
decide against the *bona fides* of a claim of title, or right, or any  
matter set up to oust their jurisdiction, without some evidence to  
warrant them in so doing, and their decision on such matter is not  
conclusive, *R. v. Nunneley*, E.B. & E. 852; 27 L.J., M.C. 260. See  
also *R. v. Wrottesley*, 1 B. & Ad. 648; *R. v. Dodson*, 9 A. & E.  
704; *R. v. Pedler*, 12 L.T. (N.S.) 17. But, of course, where the Exception.  
question of title is the very matter committed to the determination

PART III.,  
§ 44.

of the justices by a statute, their jurisdiction is not ousted, and they have to determine the question of title—*e.g.*, as under sec. 23 of the Land Act, 1869, No. 360, where justices have to hear and determine informations against persons alleged to be in unauthorised occupation of Crown lands. And so under 59 Geo. III. c. 12, sec. 24, a similar provision for the recovery of houses or tenements belonging to a parish or town, *ex parte Vaughan*, L.R., 2 Q.B. 114 ; 36 L.J., M.C. 17. And it is expressly provided by sec. 23 of the Criminal Law and Practice Amendment Statute, 1871, No. 399, that upon an information for malicious injury to fences, under sec. 178 of No. 233, no claim of right or title shall oust the jurisdiction of the justices. Where, upon a complaint for displacing the soil of streets, title was claimed under a mining lease prior to the Boroughs Statute, No. 359, the Court held that it was for the justices to decide whether the place was a street, *Koh-i-Noor G. M. Co. v. Drought*, 3 A.J.R. 48. Where there was a proviso in a penal enactment, “that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of,” and the justices decided that the appellant did not act under a reasonable supposition that he had a right to do the act complained of, and convicted him accordingly—the Court held that this proviso overrode the usual rule that a *bona fide* claim of right ousts the jurisdiction of justices, *White v. Feast*, L.R., 7 Q.B. 353.

Representative  
character.

(o) The latter clause of this section is unnecessary, as such a jurisdiction could only be conferred upon an inferior court by express and clear enactment; so that the large general power given to justices by section 37 of the Mining Companies Act, No. 228, as to calls and contributions, does not authorise an order against the executor of a deceased shareholder, *Cooper v. Bath*, 2 A.J.R. 86. But even if this section were not confined to complaints under this statute, it would not revoke the power expressly given by Act No. 228 to the official agent of a mining company to sue as its representative: for the Act No. 290, sec. 4, prevents any Act passed in the session in which this one was passed, or in the preceding session, from repealing any Act by implication, *Egglestone v. Carver*, *Argus*, 12th December, 1865. But the description of a defendant as *trustee* does not necessarily imply a representative character, and may be struck out as mere description; but where no personal liability was proved, a prohibition issued against an order upon the trustee of a cemetery, *R. v. Sherrard*, *Argus*, 2nd December, 1868. *R. v. Langford*, *ex parte Luth*, 1 A.J.R. 159.

Official agent  
of mining  
company.

Mere  
description.

Demands not  
to be divided

44. No complainant may divide any cause of action  
(p) for the purpose of making two or more complaints

before a justice; but any complainant having cause of action for more than the amount for which a complaint might be made under this Act may abandon the excess, and thereupon shall on proving his case recover to an amount not exceeding twenty pounds; and the order of the justices upon such complaint shall be in full discharge of all demands in respect of such cause of action; and entry of the order of the justices shall be made accordingly.

PART III,  
§ 45-47.

into two suits  
or complaints.

(p) "Cause of action" means *cause of one action*, and is not limited to an action on one separate contract; but it is not necessarily to include all contracts, however unconnected, which could be included in one *indebitatus* count. On an ordinary tradesman's bill, the complaint should include all items due at the time, *re Grimbley v. Aykroyd*, 17 L.J., Ex. 157; 1 Ex. 479, *nom. re Aykroyd*. Where there is a running account, the amount cannot be split up into separate complaints for each periodical payment, *R. v. Daly*, 1 A.J.R. 26.

Tradesman's  
bill.

Running  
account.

45. Where any complainant has any demand recoverable under this Act against two or more persons jointly answerable, it shall be sufficient if any of such persons be served with process; and an order may be obtained and enforced against the person or persons so served, notwithstanding that others jointly liable may not have been served or sued or may not be within Victoria; and every such person against whom any such order has been obtained and who has satisfied such order shall have the same rights and remedies as if he had been sued in the Supreme Court and had not pleaded such nonjoinder in abatement.

One of several  
persons liable  
may be sued.

46. No evidence of any demand or cause of action shall be given by the complainant on the hearing of any such complaint as aforesaid, except such as is stated in the summons issued on such complaint.

Nothing to be  
proved that is  
not stated in  
the summons.

47. No defendant in any such complaint shall be allowed to set off (q) any debt or demand claimed or

Special  
defences to be

PART III.,  
§ 48.

notified to the complainant.

recoverable by him from the complainant, or to set up by way of defence and to claim and have the benefit of illegality infancy coverture or any statute of limitations (*r*) or of his discharge under any Act relating to bankrupts or insolvent debtors, without the consent of the complainant, unless reasonable notice thereof have been given to the complainant by the post or by causing the same to be delivered at his usual or last known place of abode or business; and it shall be necessary for the defendant to produce on the hearing a duplicate of such notice and to prove that the same was so given as aforesaid; and in default thereof no such defence as aforesaid shall be set up except by consent.

Set-off must be within the jurisdiction.

(*q*) It is a question of fact for a jury (and therefore for justices) whether a defence is payment or set-off, *Thomas v. Cross*, 7 Ex. 728; 21 L.J., Ex. 251. The set-off must be in respect of a matter which would be within the jurisdiction of the justices, if it were the subject of a complaint. The amount of a guaranty cannot be set off, *Elbourne v. Pearson*, *Argus*, 22nd March, 1865. Nor can the amount due on a bill of exchange, *Wynne v. Barnard*, *Argus*, 6th April, 1868.

Plea to the jurisdiction.

(*r*) A defence which goes to the jurisdiction of the justices—*e.g.* that the complaint is not brought within the time limited—is not a special defence within this section, and need not be notified, *re Prince*, *cæ parte Binge*, 1 W.W. & A'B., L. 12.

Proceedings where defendant's set-off exceeds the complainant's claim.

48. In every complaint in which the defendant is allowed to set off any debt or demand claimed or recoverable by him from the complainant, such defendant shall be entitled to recover in such complaint the amount (if any) by which the debt or demand so set off exceeds the debt or demand claimed and proved by the complainant, and shall have an order for the same accordingly; (*s*) but if the debt or demand so set off exceeds twenty pounds and the defendant does not abandon the excess (which he is hereby allowed to do) or if it did not arise within twelve months before the complaint was made, no order whatsoever shall be made on such complaint.



(s) Where the set-off was greater than the claim, the complainant, during an adjournment of the hearing, served notice of discontinuance; but the justices, at the adjourned hearing, having made an order in favour of the defendant for the balance, the Court granted a prohibition, *Bowden v. Peate, Argus*, 26th Nov., 1863.

PART III.,  
§ 49-51.

49. If any person complain on oath to any justice that he has a cause of action cognizable by justices against any other person for any debt or damages of not more than twenty pounds, and that such person does not usually reside within the colony and is about to leave the colony without paying such debt or satisfying such damages, any two justices (whether such cause of action did or did not arise within the colony) may hear and determine the matter of such complaint in a summary way; and may make an order for the payment of such debt or so much thereof as shall appear to be due, or of any sum in the way of damages not exceeding twenty pounds.

Jurisdiction  
in case of  
stranger  
about to leave  
the colony.

50. Every person who aids abets counsels or procures the commission of any offence which is or hereafter shall be punishable on summary conviction shall be liable to be proceeded against and convicted (t) for the same either together with the principal offender or before or after his conviction; and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable to; and may be proceeded against and convicted either in the place where such principal offender may be convicted or in that in which such offence of aiding abetting counselling or procuring may have been committed.

Punishment  
of accessories  
in cases of  
summary  
convictions.  
11 & 12 Vict.  
c. 43, s. 5.

(t) The conviction must sufficiently allege an offence by the principal offender, *re Charles Smith*, 3 H. & N. 227; 27 L.J., M.C. 186.

51. Where justices are authorised by law to make an order, (u) or where any offence or act is punishable by

Limitation  
in summary



PART III.,  
§ 51.  
jurisdiction.  
Ib. s. 11.

summary conviction, if no time be specially limited for making a complaint or laying an information in the Act of Parliament relating to each case, such complaint shall be made and such information shall be laid within twelve months from the time when the matter of such complaint or information arose. (v)

Compensation  
for lands.

Ministerial  
acts.

(u) Under the English Act, the limitation attaches to orders made before the Act passed, as it did not come into operation till a certain period afterwards, *R. v. Leeds, &c., R. Co.*, 18 Q.B. 343; 21 L.J., M.C. 193. An order of justices for compensation under the Railways and Lands Clauses Acts, comes within this section, and may be quashed, although *certiorari* is taken away by those Acts, *re Edmundson*, 17 Q.B. 67. It does not apply to merely ministerial Acts, *e.g.*, issuing a distress warrant for rates, in England where certain formal proof only is needed, and there is no "order," *Sweetman v. Guest*, L.R., 3 Q.B. 262; 37 L.J., M.C. 59; 18 L.T. (N.S.) 53 (n).

When time  
begins to run.

Rates.

Calls.

Contribu-  
tions.

Part payment.

(v) But in this colony, a hearing and *order* are contemplated, apparently, as the rate is to be *recovered* before justices, or by an action of debt, under No. 184, sec. 205, and the time begins to run from the time at which the complaint becomes ripe for hearing,—for rates under the above Act, from fourteen days after demand, *Mayor of Sandhurst v. Broderick*, 3 W.W. & A'B., L. 108. Against the liquidator of a mining company, it runs—as to calls, from the time at which they were made, *Melville v. Higgins*, 1 W. & W., L. 306—as to contributions (not being calls), from the appointment of the liquidator, *Brodfoot v. O'Farrell*, 2 W. & W., L. 102. And so under Act No. 228, from the winding-up order, and not from demand, though until then the amount required be not ascertained, *Hart v. Garden, Argus*, 8th December, 1868. Under a Building Act, the time for recovery (no demand being prescribed) of expenses of removing dangerous structures, was held to run from the demand, *Labalmondiere v. Addison*, 1 E. & E. 41; 28 L.J., M.C. 25. A part payment gives a fresh starting point for the period of limitation, *R. v. Wells*, 4 W.W. & A'B., L. 31.

(w) This limitation is not a mere restriction upon procedure, but ousts the jurisdiction of the justices. *Re Prince, ex parte Binge*, 1 W.W. & A'B., L. 12; *R. v. Mainwaring*, F.B. & E. 474; 27 L.J., M.C. 278; 4 Jur. (N.S.) 928. *Melville v. Higgins, supra*.

PART IV.—MATTERS PRELIMINARY TO EXAMINATION  
OR HEARING.

52. Where a charge or complaint is made before any justice that any person has committed or is suspected to have committed any treason felony or indictable misdemeanor or other indictable offence whatsoever within the limits of the jurisdiction of such justice, or that any person guilty or suspected to be guilty of having committed any such crime or offence elsewhere out of the jurisdiction of such justice is residing or being or is suspected to reside or be within the limits of such jurisdiction, then and in every such case if the person against whom such charge or complaint is made be not then in custody, such justice may issue his warrant (x) to apprehend such person and to cause him to be brought before such justice or any other justice to answer to such charge or complaint and to be further dealt with according to law.

PART IV.,  
§ 52, 53.

Issue of  
warrant  
against person  
accused of  
indictable  
offence.  
Ib. s. 1.  
11 & 12 Vict.  
c. 42, s. 1.

Second  
Schedule,  
Forms v., vi.

(x) All warrants must show that the justices had jurisdiction, *re Peerless*, 1 Q.B. 143. A warrant of arrest, under this Part, must show that it issues upon an information upon oath; and a deposition taken, not in the presence and within the hearing of a justice but, by the clerk, is insufficient to give jurisdiction, *Caudle v. Seymour*, *ib.* 889. And see sec. 60, *post*. But a misrecital in the warrant, that the information was upon the oath of the wrong person, does not invalidate the commitment; it may be rejected as surplusage. *Massey v. Johnson*, 12 East, 67.

Must show  
jurisdiction.

53. In all cases the justice to whom such charge or complaint is preferred, if he think fit, instead of issuing in the first instance his warrant to apprehend the person against whom such charge or complaint is made, may issue his summons directed to such person requiring him to appear at a time and place therein mentioned before the said justice or before such other justice or justices as may then be there. But nothing herein contained shall prevent any justice from issuing

Summons  
may be issued  
instead of  
warrant.  
11 & 12 Vict.  
c. 42, s. 1.  
Second  
Schedule,  
Form vii.

PART IV.,  
§ 54, 55.

the warrant hereinbefore first mentioned at any time before or after the time mentioned in such summons for the appearance of the said accused party.

Where  
defendant  
already before  
justices.

(y) There is no necessity for an information prior to the summons, in cases within the summary jurisdiction. Where a party is before the justices, and he is then charged with an offence within their jurisdiction, they may proceed to hear such charge, though there be no information or issue of summons, unless such previous steps be required by the statute creating the offence. The want of a summons would be a good ground for asking for an adjournment, *R. v. Shaw*, 34 L.J., M.C. 169; 10 Cox C.C. 66; 11 Jur. (N.S.) 415; 12 L.T. (N.S.) 470.

Issue of  
warrant  
against person  
accused of  
offences  
committed on  
the high seas  
or abroad.  
Ib. s. 2.  
Second  
Schedule,  
Form viii.

54. In all cases of indictable crimes or offences of any kind or nature whatsoever committed on the high seas or in any creek harbor haven or other place in which the Admiralty of England have or claim to have jurisdiction, and in all cases of crimes or offences committed on land beyond the seas for which an information may legally be exhibited in Victoria, any justice may issue his warrant to apprehend the person so charged and to cause him to be brought before him or some other justice or justices to answer to the said charges and to be further dealt with according to law.

(z) A crime or misdemeanor by a governor of a colony beyond the seas, in the exercise of his office (under 11 & 12 Will. III. c. 12, and 42 Geo. III. c. 85), comes within this section, *R. v. Elyre*, L.R., 3 Q.B. 487; 37 L.J., M.C. 159. Where a person had previously been charged with a crime or offence within this section, and a warrant had been issued for his apprehension, in another colony (under which warrant, duly backed, he was arrested in this colony), it was held that a warrant must issue, and he must be tried, here, *re Levinger*, 6 W.W. & A'B., L. 8. The provisions of 6 & 7 Vic. c. 34, as to committing an offender to gaol till he can be sent to the colony or possession in which the offence was committed, do not apply with reference to the place where he was first charged, *ibid.*

Where  
warrant  
already issued  
in another  
colony.

Warrant to  
apprehend  
where  
information is  
found.

55. Where any information is exhibited in the Supreme Court in its criminal jurisdiction (a) or in any court of general sessions of the peace against any person who is then at large, and whether such person

have been bound by any recognizance to appear to answer to the same or not, the proper officer of the Supreme Court or the clerk of the peace at such sessions shall, at any time after such information has been exhibited upon application of the prosecutor or of any person on his behalf if such person have not already appeared and pleaded to such information, grant unto such prosecutor or person a certificate of such information having been exhibited; and upon production of such certificate to any justice, such justice shall issue his warrant to apprehend such person so informed against and to cause him to be brought before such justice or any other justice or justices to be dealt with according to law.

PART IV.,  
§ 56.

Ib. s. 3.

Second  
Schedule  
Forms ix., x.

(a) Where a warrant was issued upon a certificate of the clerk of arraigns of the Supreme Court on circuit, that an information had been filed, it was held bad for not stating where the Court out of which the certificate issued was sitting, *R. v. Dyring, Argus*, April 2nd, 1864. As to arrest by a constable to whom the warrant is not addressed, see sec. 59 (g), *post*.

Where court  
sitting.

56. If such person be thereupon apprehended and brought before any such justice, such justice, upon its being proved upon oath before him that the person so apprehended is the same person who is charged and named in such information, shall without further inquiry or examination commit him for trial or admit him to bail (b) in manner hereinafter mentioned; or if the person against whom such information is exhibited be confined in any gaol or prison for any other offence than that charged in the said information at the time of such application and production of the said certificate to such justice as aforesaid, such justice, upon it being proved before him upon oath that the person against whom such information is exhibited and the person so confined in prison are one and the same person, shall issue his warrant directed to the gaoler or

Person so  
apprehended  
to be  
committed for  
trial or bailed.  
Ib. s. 3.

Second  
Schedule,  
Forms xi., xii.



PART IV.,  
§ 57, 58.

keeper of the gaol or prison in which the person so informed against shall then be confined as aforesaid, commanding him to detain such person in his custody until by Her Majesty's writ of *habeas corpus* he be removed therefrom for the purpose of being tried upon the said information or until he be otherwise removed or discharged out of his custody by due course of law.

Rule for  
exercise of  
discretion.

(b) The discretion of the justices as to admitting to bail, should be guided by the probability of the prisoner appearing to take his trial, considering the nature of the crime charged, the severity of the punishment which may be imposed, and the probability of a conviction, *re Robinson*, 23 L.J., Q.B. 286.

Sunday  
warrants.  
11 & 12 Vict.  
c. 42, s. 4.

57. Any justice may grant or issue any warrant as aforesaid or any search (c) warrant on a Sunday (d) as well as on any other day.

Search  
warrant,  
actual felony.

(c) A positive oath that a felony has actually been committed is not necessary to authorise a justice to grant his warrant to search the premises and apprehend the person of a party suspected of felony, *Elsee v. Smith*, 2 Chit. 304. If the person against whom the search warrant is issued, get possession of it, and refuse to give it up, the officer executing it has a right to take it from him by force, *R. v. Mitton*, 3 C. & P. 31. Under a warrant to search for certain specific goods, alleged to have been stolen, if the constable take other goods also supposed to have been stolen, he will be liable for trespass, unless such other goods be likely to furnish evidence of the identity of the goods mentioned in the warrant, *Crozier v. Cundy*, 6 B. & C. 232.

Forcible  
recovery of  
warrant.

Taking goods  
not included.

goods, alleged to have been stolen, if the constable take other goods also supposed to have been stolen, he will be liable for trespass, unless such other goods be likely to furnish evidence of the identity of the goods mentioned in the warrant, *Crozier v. Cundy*, 6 B. & C. 232.

Execution on  
Sunday.

(d) Before this Act, a warrant for arrest for any *indictable offence* might be *executed* on a Sunday, notwithstanding 29 Charles II. c. 7, sec. 6, *Rawlins v. Ellis*, 16 M. & W. 172; 16 L.J., Ex. 5. And under this sec. the authority to issue a warrant on Sunday would seem to authorise its execution also on Sunday.

Issue of  
summons in  
cases of  
summary  
jurisdiction.  
Ib. c. 43, s. 1.

58. Where an information is laid (e) before any justice that any person has committed or is suspected to have committed within the jurisdiction (f) of such justice any offence or act for which he is liable by law upon a summary conviction for the same before jus-



tices to be imprisoned or fined or otherwise punished, or where a complaint is made to any justice upon which justices have authority by law to make any order for the payment of money or otherwise, such justice may issue his summons in the form in the Second Schedule hereto. Provided that nothing herein contained shall oblige any justice to issue any such summons in any case where the application for any order of justices is by law to be made *ex parte*.

PART IV.,  
§ 59, 60.

Second  
Schedule,  
Form vii.

(e) Where the Act creating the offence, prescribes the person or officer by whom the information is to be laid, no other person may be complainant. A prohibition was granted against a conviction for a penalty under the Gunpowder Act, on the information of an unauthorised person, *R. v. McLachlan, ex parte Francis, Argus*, March 23rd, 1861.

Information  
by  
unauthorised  
person.

(f) It is not competent for a prisoner, on *habeas corpus*, to show by affidavit that the offence of which he was convicted, was not committed within the jurisdiction of the convicting justice, *re Charles Smith*, 3 H. & N. 227; 27 L.J., M.C. 186.

Offence not  
committed  
within  
jurisdiction.

59. Where an information is laid for any offence punishable on conviction, the justice before whom such information is laid may (if he think fit) instead of issuing such summons as aforesaid issue in the first instance his warrant for apprehending the person against whom such information shall have been so laid and bringing him before the same justice or before some other justice or justices to answer to the said information and to be further dealt with according to law.

In offences  
punishable on  
summary  
conviction  
warrant may  
be issued  
instead of  
summons.  
Ib. s. 2.  
Second  
Schedule  
Form vi.

60. No warrant to apprehend any person shall be issued by any justice unless the charge information or complaint be in writing and be substantiated (g) by the oath of the person making such charge or of such informant or complainant or of some credible witness; but where a summons is issued the charge information or complaint, unless some particular Act of Parliament

Warrant to be  
on oath but  
not summons.  
Ib. c. 42, s. 8.  
Proviso.  
Ib. c. 43, ss. 8,  
10.

PART IV., otherwise require, may be by parol merely and with-  
 § 61. out any oath to support or substantiate the same.

Deposition  
not taken  
before justice.

(g) A deposition taken by the justices' clerk, and not before, and in the hearing of, the justice, is not sufficient; and a justice issuing a warrant based upon it, is liable to an action of trespass, as acting without jurisdiction, *Caudle v. Seymour*, 1 Q.B. 889. But the commitment is not bad, where the warrant states the information to be on the oath of the wrong person, *Massey v. Johnson*, 12 East. 67.

Waiver by  
appearance.

If the defendant appear to the summons, an information on oath was not—even before this Act—necessary to support a conviction, *R. v. Millard*, Dears. C.C. 166.

Form and  
direction of  
warrant.  
Ib. c. 42, s. 10.  
Ib. c. 43, s. 3.

61. Every warrant issued by any justice to apprehend any person shall be under the hand and seal of the justice issuing the same, and may be directed (h) either to any constable or other person by name or generally without naming them to all constables or peace officers in the district within which the justice issuing such warrant has jurisdiction; and it shall state shortly the offence or the matter of the information or complaint on which it is founded, and shall name or otherwise describe the person against whom it is issued; and it shall order the constable or other person to whom it is directed to apprehend the person so named or described and bring him before the justice issuing the said warrant or before some other justice to answer to the charge contained in the said information or complaint and to be further dealt with according to law; and it shall not be necessary to make such warrant returnable at any particular time, but the same may remain in force until it shall be executed.

By whom to  
be executed.

(h) Where a warrant of commitment was directed to the parish constable of A, it was held that it could not be executed by a county policeman, *R. v. Saunders*, L.R., 1 C.C.R. 75; 36 L.J., M.C. 87. But that case could hardly apply to this colony, where the police all belong to one body, and the form given in the schedule is directed to all other peace officers.

62. Every such warrant (i) may be executed by apprehending the offender at any place within the limits of the jurisdiction of the justice issuing the same, or in case of fresh pursuit at any place in Victoria within seven miles of such limits without having such warrant backed as hereinafter mentioned.

PART IV.,  
§ 62, 63.

Execution of  
Warrant.  
11 & 12 Vict.  
c. 42, s. 10.  
Ib. c. 43, s. 3.

(i) The constable making the arrest is bound to have the warrant with him, ready to be produced if production be demanded, and not having it, he is not justified in making the arrest, *Galliard v. Laxton*, 2 B. & S. 363; 31 L.J., M.C. 123; where a conviction for assaulting the arresting constable was quashed, though no demand had been made for production of the warrant at the time of the arrest, and it was at the station-house.

Constable to  
have warrant  
with him.

63. If the person against whom any warrant is issued be not found within the jurisdiction of the justice by whom the same is issued, or if he escape come or go into reside or be or be supposed or suspected to be in any place in Victoria out of the jurisdiction of the justice issuing such warrant (whether such warrant have been issued in Victoria or elsewhere) (j) any justice upon proof alone being made on oath of the handwriting of the justice issuing such warrant may make an endorsement on such warrant signed with his name authorising the execution of such warrant within the jurisdiction of the justice making such endorsement; and such endorsement shall be sufficient authority to the person bringing such warrant and to all other persons to whom the same was originally directed and also to all constables and other peace officers of Victoria or of any city town or borough thereof where such warrant is so endorsed to execute the same and to carry the person against whom such warrant has issued when apprehended before the justice who first issued the said warrant or before any justice for Victoria; and the justice before whom the prisoner is brought may thereupon proceed to inquire into the charge in the manner hereinafter mentioned, or may

Backing of  
warrants.  
Ib. c. 42, s. 11.  
Ib. c. 43, s. 3.  
Second  
Schedule  
Form xiii.

PART IV.,  
§ 64, 65.

order the prisoner to be taken and conveyed to the justice who first issued the warrant; and such last-mentioned justice shall thereupon proceed as if the prisoner had been apprehended within his jurisdiction.

Backing  
warrant from  
another  
colony.

(j) An insolvent having absconded from the colony of South Australia, a warrant for his apprehension was issued by a justice of that colony, and backed by a justice here. It was held that the return to a *habeas corpus* need not set out the law of South Australia, as if the prisoner were to be tried here; but as it stated that he had been guilty of an indictable offence, according to the law of that colony, that was sufficient to justify the court in sending him back there, *re Simeon Raphael, Argus*, 23rd March, 1858.

Form and  
direction of  
summons.

Ib. c. 42, s. 9.  
Ib. c. 43, s. 1.

64. Except where it is otherwise expressly provided every summons shall be under the hand and seal of the justice issuing the same, and shall be directed to the party against whom the charge information or complaint is made, and shall state shortly the matter of such charge information or complaint, and shall require the party to whom it is so directed to be and appear at a certain time and place therein mentioned before the justice who issues such summons or before such other justice or justices as may then be there to answer to the said charge information or complaint and to be further dealt with according to law.

Service of  
summons.  
Ib.

Repealed by  
No. 319 s. 2,  
which follows.

65. *Every summons shall be served within a reasonable time (k) before the hearing thereof by a constable or peace officer or other person upon the person to whom it is so directed by delivering the same to the party personally or by leaving the same with some person for him at his last or most usual place of abode; (l) and the constable or peace officer or other person who shall have served the same in manner aforesaid shall attend at the time and place and before the justices in the said summons mentioned to depose if necessary to the service of such summons.*



2. The sixty-fifth section of "*The Justices of the Peace Statute 1865*" shall be and the same is hereby repealed, and in lieu thereof the following shall from the passing of this Act be and be deemed to be and may be cited as the sixty-fifth section of the said Statute (that is to say):—"Every summons shall be served within a reasonable time (*k*) before the hearing thereof by a constable or peace officer or other person upon the party to whom it is so directed, by delivering a true copy thereof to the party personally or by leaving the same with some person for him at his last or most usual place of abode; (*l*) and the constable or peace officer or other person who shall have served the same in manner aforesaid shall either attend at the time and place and before the justices in the said summons mentioned to depose to the service thereof, or in case such copy shall have been delivered to the party personally shall make and sign before some justice or commissioner for taking affidavits an affidavit endorsed on the original summons and stating the time and the manner in which the true copy thereof has been served, and shall forthwith transmit such original summons for production at the time and place and before the justices therein mentioned; and every affidavit purporting to have been so made and signed may be received by any justice or justices as proof of the service of the summons within the meaning of the sixty-seventh, the seventy-fifth, or the one hundred and first section of this Statute."

PART IV.,  
§ 65.

No. 319,  
passed 6th  
Sept., 1867.

Service of  
summonses.

(*k*) The reasonableness of the time is a question for the justices. Reasonable time, question for justices.  
*Exp. Hopwood*, 4 New Sess. Cas. 174; 15 Q.B. 121; 19 L.J., M.C. 197. *Exp. Williams*, 2 L.M. & P. 580; 21 L.J., M.C. 46; 15 Jur. 1060. Where a county court summons had been served by mistake at the wrong place, and the judge, being satisfied with the evidence of sufficiency of service, gave judgment for the plaintiff, but afterwards consented to grant a new trial on terms which were not accepted, the court refused a prohibition, *Robinson v. Lenaghan*, 5 D. & L. 635;



- PART IV.,  
§ 66, 67.
- Exceptions. 2 Ex. 333; 17 L.J., Ex. 174. The Court will not interfere unless it clearly appear that there was in fact *no* service, *exp. Rice Jones*, 1 L.M. & P. 357; 19 L.J., M.C. 151, *nom. R. v. Evans*; or that there was not the interval prescribed by the particular statute, *Mitchell v. Foster*, 12 A. & E. 472; or that the justices have mistaken the law as to the kind of service required, *R. v. Goodrich*, 19 L.J., Q.B. 415; 14 Jur. 914. *Mason v. Bibby*, 2 H. & C. 881; 33 L.J., M.C. 105.
- Place of abode.  
In Gaol. (l) Service on the defendant's clerk, at his place of business, was held to comply with service at his place of abode, though he did not reside there, *ibid.* If the defendant be in gaol, service at his last place of abode out of gaol is not sufficient, *R. v. Foster*, 1 W.W. & A'B., L. 8. Under a Bastardy Act, service at the last place of abode was held sufficient, though the defendant had left the country; because the Act limited the time for complaint to twelve months from the birth of the child, *R. v. Damarell*, L.R., 3 Q.B. 50; 37 L.J., M.C. 21. Where it was shown before the justices that when the complainant served the summons at the last place of abode of the defendant, he was informed that the latter was in England—the court granted a rule absolute in the first instance for *certiorari*, *Rees v. Jones, Argus*, 26th November, 1868. The last place of abode of the defendant, means his present place of abode, if he have any; and if not, the last he had, *ex parte Rice Jones, supra.*
- Out of the country.
- Waiver. (m) Any objection for want of summons or notice is waived by the appearance of the defendant at the hearing, *R. v. Ward*, 3 Cox, C.C. 279.
- Service of copy. (n) Before the Amending Act, No. 319, sec. 2, service of a copy of the summons was held sufficient, *R. v. Chandler*, 14 East, 268; and that Act expressly makes it so.
- Disobedience of summons.  
11 & 12 Vict. c. 42, s. 9.  
Ib. c. 43, s. 2.  
Second Schedule, Form xiv. 66. If the person so served do not appear before the justice at the time and place mentioned in such summons in obedience to the same, such justice may issue his warrant for apprehending the party so summoned and bringing him before such justice or some other justice or justices to answer to the said charge information or complaint and to be further dealt with according to law.
- In summary jurisdiction warrant issued or 67. Where a summons is issued in any case in which a summary conviction may be obtained or order may be made, and upon the day and at the place appointed

in and by the said summons for the appearance of the party so summoned such party fails to appear (o) accordingly, if it be proved upon oath to the justice or justices then present that such summons was duly served upon such party a reasonable (p) time before the time so appointed for his appearance as aforesaid, such justice or justices may upon oath or affirmation being made substantiating the matter of the information or complaint issue their warrant to apprehend the party so summoned to bring him before them or some other justices to answer to the said information or complaint and to be further dealt with according to law; or may proceed *ex parte* to the hearing of such information or complaint and may adjudicate thereon as fully and effectually to all intents and purposes as if such party had personally appeared before him or them in obedience to the said summons.

PART IV.,  
§ 68.

*ex parte*  
proceeding  
after  
summons.  
Ib. c. 43, s. 2.

(o) Appearance by counsel or attorney is sufficient, and in such case a warrant is not to issue, *Bessell v. Wilson*, 1 E. & B., at p. 499; 22 L.J., M.C. 94. Appearance.

(p) Reasonable time; see sec. 65 (k), *ante*. By sec. 2 of the Amending Act, No. 319, the *affidavit* of the person who served, may be received as proof of service; *ante* sec. 65. Reasonable time—  
affidavit of service.

68. In any information or complaint or the proceedings thereon, if it be necessary to state the ownership of any property belonging to or in the possession of partners joint tenants parceners or tenants in common, it shall be sufficient to name one of such persons and to state the property to belong to the person so named and another or others (as the case may be); and if it be necessary to mention for any purpose whatever any partners joint tenants parceners or tenants in common, it shall be sufficient to describe them in manner aforesaid; and all materials or tools provided for making or repairing any road and buildings gates lamps boards stones posts fences or other things erected or provided

Short  
description in  
summary  
jurisdiction.  
Ib. s. 4.

PART IV.,  
§ 69, 70.

for the purpose of any such road may be described as the property of the board council or trustees who have the care or management of the said road without naming them.

Technical  
defects.  
Ib. c. 42, ss. 8,  
10.

69. No objection shall be taken or allowed to any information complaint warrant or summons for any defect therein in substance or in form, or for any variance between it and the evidence adduced on the part of the prosecution before the justices who take the examinations of the witnesses in that behalf as herein-after mentioned; but if any such (*q*) variance appear to such justices to be such that the party charged has been thereby deceived or misled, such justices at the request of the party so charged may adjourn (*r*) the hearing of the case to some future day, and in the meantime may remand the party so charged or may commit him to custody or may admit him to bail with or without sureties.

Amendment.

(*q*) Including more than one matter in one complaint, is a subject for amendment under this section, and not a ground for dismissing the case, *R. v. Cogdon, ex parte Wilkinson*, 2 A.J.R. 84. This section applies to all informations, whether of indictable offences or summary convictions, *Pyrke v. Nettleton*, 3 A.J.R. 27.

And adjourn-  
ment for that  
purpose.

(*r*) More than one adjournment may be made for further amendment of the information, or for amendment of the summons to make it correspond with the amended information, if necessary, *Western v. Stewart, Argus*, April 7th, 1866. Where a statute makes an act an offence, if done knowingly, the omission of an allegation to that effect, is matter of substance, *R. v. Jukes*, 8 T.R. 536.

Variances.  
Ib. c. 43, s. 9.

70. In all cases of informations for any offences or acts punishable upon summary conviction, any variance between such information and the evidence adduced in support thereof as to the time at which such offence or act is alleged to have been committed shall not be deemed material (*s*) if it be proved that such information was in fact laid within the time limited by

law for laying the same; and any variance between such information and the evidence adduced in support thereof as to the place in which the offence or act is alleged to have been committed shall not be deemed material. Provided that the offence or act be proved to have been committed within the jurisdiction (t) of the justices by whom such information is heard and determined.

PART IV.,  
§ 71.

(s) This does not include a case in which the offence proved is altogether different from that charged in the information. Where the appellant had been summoned for drunkenness and riotous behaviour under one Act, and was convicted of drunkenness alone under another Act, the conviction was held bad, and not curable under this power, *Martin v. Pridgeon*, 1 E. & E. 778; 28 L.J., M.C. 179. Where partners were sued as such upon an agreement made by them as an incorporated company, this was held not a fatal variance, *Whittle v. Frankland*, 2 B. & S. 49; 31 L.J., M.C. 81.

(t) But the place must be alleged and proved to be within the jurisdiction, *ibid.*; *Read v. Pope*, 1 C.M. & R. 302. Where the defendant was sued as secretary and trustee of a cemetery, it was held that this was mere description, which the justices might strike out under this section, *R. v. Sherard*, *Argus*, 2nd Dec., 1868.

71. If any such variance or any variance in any other respect between the information and the evidence adduced in support thereof appear to the justices present and acting at the hearing to be such that the party apprehended under such warrant or charged by such information has been thereby deceived or misled, such justices upon such terms as they think fit may adjourn the hearing of the case to some future day and in the meantime may commit the defendant to the nearest or most convenient gaol or other prison or place of security or to such other custody as they think fit; or may discharge him upon his entering into a recognizance with or without surety at the discretion of such justices conditioned for his appearance at the time and place to which such hearing is so adjourned.

If defendant prejudiced by any defect, case may be adjourned and defendant admitted to bail.  
11 & 12 Vict. c. 43, s. 9.



PART IV.,  
§ 72, 73.

Proceedings  
where  
defendant  
when bailed  
does not  
appear.  
Ib. c. 42, s. 21.  
Ib. c. 43, s. 9.

72. Where a defendant is discharged upon any recognizance under this Act and does not afterwards appear at the time and place in such recognizance mentioned, the justice who has taken the said recognizance or any justice or justices who may then be there present may estreat such recognizance; and thereupon proceedings shall be taken upon such recognizance in like manner as proceedings are taken by law upon other recognizances.

Each  
complaint and  
information  
to be for one  
matter only  
and may be  
by attorney.  
Ib. c. 43, s. 10.

73. In all cases of complaint upon which justices are authorised by law to make an order, and in all cases of information for offences or acts punishable upon summary conviction, unless this or some other Act expressly provide to the contrary, every complaint shall be for one matter of complaint only and not for two or more matters of complaint; and every information shall be for one (*u*) offence only and not for two (*v*) or more offences; and every such complaint or information may be laid or made by the complainant or informant in person or by his counsel or attorney or other person authorised in that behalf.

One offence.

(*u*) "Causing and permitting" an injury, are not two matters of complaint, *R. v. Cogdon, exp. Wilkinson*, 2 A.J.R. 84. A conviction must be good in all its parts; the information must be supported by the evidence, and the judgment by both. If the offences were of such a nature that they could have been included in one conviction, the defendant should be convicted of both. A judgment for too little is as bad as a judgment for too much, *R. v. Salomons*, 1 T.R. 249. It cannot be good in part and bad in part, *R. v. Catherall*, 2 Strange 900. When an act makes one offence consisting of several elements, this section does not apply—as where the conviction was for profane swearing (there being several oaths or repetitions of the same oath), imposing a cumulative penalty of two shillings for each oath, the conviction was upheld as for one offence, *R. v. Scott*, 4 B. & S. 368; 33 L.J., M.C. 15. And so of things which may be simultaneous, as permitting drunkenness and disorderly conduct on licensed premises; inciting to mutiny and other traitorous practices; defacing, injuring and destroying a register, *Wray v. Toke*, 3 New Ses. Cas., at p. 300; 12 Q.B., at p. 508. Charging the commission of an

Several  
elements.

Simultaneous  
offences.



offence on a certain day, and on divers other days and times, is not objectionable as alleging the commission of several offences; and a conviction for another day than that specified, was sustained, *Only v. Gee*, 30 L.J., M.C. 222.

PART IV.,  
§ 74.

Divers days  
and times.

(v) Only one call upon shares can be included in one complaint, *Ogier v. Ballarat Pyrites Co.*, *Argus*, Nov. 22, 1867. But under the Mining Companies Act, 1871, No. 409, sec. 52, payment of any number of calls may be enforced in one and the same proceeding. Under a copyright act, selling several copies of an engraving together, constitutes a distinct offence for each copy, *exp. Beal*, L.R., 3 Q.B. 387; 37 L.J., M.C. 161. Under an enactment that no person, &c., shall keep his house open for sale of beer, or shall sell beer, or shall suffer beer to be drunk in the house, at certain hours—a conviction for all these three things was held bad, as including more than one distinct offence, and trespass lay for enforcing the penalty by distress, *Newman v. Bendyshe*, 10 A. & E. 11; 2 Per. & Dav. 340. Where an information contained two distinct offences, and the conviction was for the said offence, it was held bad, *R. v. Salomons*, 1 T.R. 249. A conviction for depasturing too many sheep on a common, on three different days, was held bad, as including three distinct offences, *Lloyd v. Gibb*, 1 A.J.R. 134. Where a defendant was convicted of selling, or causing or allowing to be sold, ale without a license, the Court, in refusing a prohibition, said that when the conviction should be before it (it was not yet drawn up), if it stated two offences, the Court would amend, *R. v. Lavis*, *Argus*, 24th March, 1869; but that must be taken as an intimation that the offences were really one; for a conviction in the alternative, or for two offences, is bad, as shown by the cases here cited. A conviction for selling ale *or beer*, without a license, was held bad, the objection being one of substance, and not merely of form, *R. v. North*, 6 D. & R. 143. It would seem that a conviction for unlawfully administering to, or receiving from, any person an oath *or affidavit* is bad for the same reason, *R. v. Nott*, 4 Q.B. 768. And so of stealing sovereigns *or half sovereigns*, 19 L.J., M.C. 138. Several defendants should not be convicted in one conviction on one information, for an offence which is separate in its nature, and therefore a separate offence by each, *R. v. Cridland*, 7 E. & B. 870; 27 L.J., M.C. 32; 3 Jur. (N.S.) 1213, *per* Crompton, J. *Morgan v. Brown*, 4 A. & E. 515; 6 N. & M. 57.

Several  
offences and  
matters.

Offences in  
the alterna-  
tive.

Several  
defendants.

74. If it be made to appear to any justice by the oath of any credible person that any person within the jurisdiction of such justice is likely to give material evidence in cases of indictable offences for the prosecution or for the accused person and in cases of summary

Witness may  
be summoned.  
Ib. c. 42, s. 16.  
Ib. c. 43, s. 7.

PART IV.,  
§ 75.Second  
Schedule,  
Form xv.

jurisdiction in behalf of the prosecutor or complainant or defendant, and will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the hearing of the charge information or complaint, such justice shall issue his summons to such person requiring him to be and appear at a time and place mentioned in such summons before the said justice or before such other justice or justices as shall then be there, to testify what he knows concerning the matter of the said charge information or complaint.

Secondary  
evidence.

(v) A *subpœna duces tecum* to a witness to bring up documents, in a superior Court is compulsory, and it is for the Court, and not the witness, to judge whether there is a reasonable excuse for not producing. A witness neglecting to produce, is liable to an action at the suit of the party summoning him, *Amery v. Long*, 9 East. 473. A summons to produce all documents, &c., for thirty years back, is too vague, and the witness may refuse production; but if he admit that he has them, he must produce them, and cannot insist on being sworn first, *Lee v. Angas*, L.R., 2 Eq. 59; 35 L.J., ch. 370. *R. v. Llanfaethly*, 2 E. & B. 940; 23 L.J., M.C. 33, in which latter case the witness was to produce books at the general sessions; but it does not appear whence the summons issued—presumably from the Crown office. But if he refuse, though he may be punished, secondary evidence will not be admitted unless the court allow his excuse for non-production.

(w) But justices have no power to enforce obedience to a summons to produce documents; such a summons is not equivalent to a *subpœna duces tecum*; and on disobedience to it, secondary evidence is not admissible. But a Crown office *subpœna* (and in this colony a writ from the prothonotary's office) may be sued out for the purpose, *R. v. Orton*, 7 Q.B. 120; 14 L.J., M.C. 89. *R. v. Greenaway*, *R. v. Carey*, 7 Q.B. 126; 14 L.J., M.C. 190.

Attendance  
of witness  
enforced by  
warrant.  
11 & 12 Vict.  
c. 43, s. 7.

75. Where any person so summoned neglects or refuses to appear at the time and place appointed by the said summons, if no just excuse be offered for such neglect or refusal, and if proof upon oath be given that such summons was duly served upon such person and that (in cases where a summary con-

viction may be obtained or an order may be made) a reasonable sum was paid or tendered to him for his costs and expenses in that behalf, the justice before whom such person should have appeared may issue a warrant to bring and have such person at a time and place to be therein mentioned before the justice who issued the said summons or before such other justices as shall then be there, to testify as aforesaid. Such warrant may if necessary be backed as hereinbefore mentioned in order to its being executed out of the jurisdiction of the justice who has issued the same. Or if such justice be satisfied by evidence upon oath that it is probable that such person will not attend to give evidence without being compelled so to do, he may instead of issuing such summons issue his warrant in the first instance, which warrant if necessary may be backed as aforesaid.

PART IV.,  
§ 76.

Second  
Schedule,  
Form xvi.,  
xvii.

The affidavit of the person serving the summons, may be received as proof of service. See section 2 of the Amending Act, No. 319 which follows section 65, *ante*.

Affidavit of  
service.

76. If, on the appearance of the person so summoned before the said last-mentioned justice or justices either in obedience to the said summons or upon being brought before him or them by virtue of the said warrant, such person refuse to be examined upon oath concerning the premises or refuse to take such oath or having taken such oath refuse to answer such questions concerning the premises as shall then be put to him without offering any just excuse for such refusal, any justice then present and having there jurisdiction may by warrant commit the person so refusing to the nearest or most convenient gaol there to remain and be imprisoned for any time not exceeding seven days unless he in the meantime consent to be examined and to answer concerning the premises.

Witness  
refusing to be  
examined  
may be  
committed.  
Ib.

Second  
Schedule,  
Form xviii.

PARTS IV., V.,  
§ 77-79.

Clerk of petty  
sessions may  
in certain  
cases postpone  
hearing of  
summons.

Second  
Schedule,  
Form xix.

Witness to  
attend at the  
time to which  
hearing  
adjourned.

Examination  
of witnesses.  
11 & 12 Vict.  
c. 42, s. 17.

77. If on the return of any summons or at any adjournment of the hearing or at the time to which the same may be postponed there be not present any justice or a sufficient number of justices legally competent to hear and determine the subject matter of such summons (as the case may be), the clerk of the petty sessions shall at the request of the complainant or informant postpone the hearing until the next day on which a court of petty sessions will be held at the place mentioned in such summons; and every such postponement shall be made by delivering to the complainant and defendant or such of them as shall be present a memorandum in the form contained in the Second Schedule hereto.

78. Every witness to whom a copy of any such memorandum is delivered shall attend at the time and place therein mentioned, and shall be subject to the same obligations and liabilities as if such memorandum were a summons issued by a justice requiring such person to testify what he knows concerning the matter of the information or complaint.

#### PART V.—PROCEDURE ON COMMITMENT FOR TRIAL.

79. Where any person appears (*y*) or is brought before any justices charged with any indictable offence, whether committed in Victoria or upon the high seas or elsewhere (*z*) beyond the limits of Victoria or whether such person appear voluntarily upon summons or have been apprehended with or without warrant or be in custody for the same or any other offence, such justices, (*a*) before they commit such accused person to prison for trial or before they admit him to bail, shall, in the presence of such accused person who shall be at liberty to put questions to any witness produced against



him, take (a) the statement on oath of those who know the facts and circumstances of the case, and shall put the same into writing; (b) and such depositions shall be read over to and signed respectively by the witnesses who have been so examined and shall be signed (c) also by the justices taking the same; and the justices before whom any such witness appears to be examined as aforesaid shall before (d) such witness is examined administer to him the usual oath, which such justices shall have full power and authority to do.

PART V.,  
§ 79.

Second  
Schedule,  
Form xx.

(y) In such proceedings, the person charged has no right to the assistance of counsel or attorney; it is entirely in the discretion of the justices whether they will allow it, *Cox v. Coleridge*, 1 B. & C. 37; *R. v. Borron*, 3 B. & Ald. 432.

(z) Justices must act under this section in the case of a person charged with an offence committed out of the colony. A *mandamus* issued to justices to act under this section, in a charge against a governor of a colony, under 11 & 12 Will. III. c. 12, and 42 Geo. III. c. 85—of misdemeanour or crime in his office in a colony beyond the seas, *R. v. Eyre*, L.R., 3 Q.B. 487; 37 L.J., M.C. 159. And the justices must act in the case of a crime committed out of the British dominions, though a warrant has been issued for the apprehension of the accused in the colony in which he first landed, and in which he eluded capture. And he must be tried in this colony, if therein arrested, *re Levinger*, 6 W.W. & A'B., L. 8. Where justices declined to hear an information for perjury, because the suit in which it was charged to have been committed, was still pending, the Court refused a rule to compel them to hear it, *R. v. Ingham*, 14 Q.B. 396; 19 L.J., M.C. 69.

(a) Where the evidence was taken before the clerk, and afterwards read over in presence of all parties, the witnesses and the justices, it was held irregular and inadmissible, and the conviction was quashed, *R. v. Watts*, 9 Cox C.C. 395; 33 L.J., M.C. 63.

(b) Justices should be careful to take down a full statement of all the witnesses say, in proceedings under this section, *R. v. Grady*, 7 C. & P. 650; *R. v. Thomas*, *ibid.* 817.

(c) It is not necessary that the justice should sign every deposition; if they are all attached together, and signed once, at the end, that is sufficient, *R. v. Parker*, L.R., 1 C.C.R. 225; 39 L.J., M.C. 60.

One signature  
to several  
depositions.



PART V.,  
§ 80.Oath before  
evidence.Depositions  
of persons  
dead or  
absent.  
Ib. s. 17.

(*d*) It is very improper to take the evidence of the witness first, and then swear him to the truth of it; he must be sworn first, *R. v. Kiddy*, 4 D. & R. 734.

80. If upon the trial of the person so accused it be proved by the oath of any credible witness that any person whose deposition has been taken (*e*) as aforesaid is dead or so ill (*f*) as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then if such deposition purport (*g*) to be signed by the justice by or before whom the same purports to have been taken, such deposition may be read as evidence in such prosecution without further proof thereof unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.

To be taken  
in presence of  
justice.

(*e*) If the deposition be not taken before, and in the presence of, the justice, it will be inadmissible, though it be afterwards read over before the justice, *R. v. Watts*, 9 Cox C.C. 395; 33 L.J., M.C. 63. *Caudle v. Seymour*, 1 Q.B. 889.

Absence of  
witness on  
account of  
pregnancy.  
Insanity.Procurement  
of prisoner.

(*f*) A woman being in such an advanced state of pregnancy as to be unable to travel, upon the oath of her husband to that effect, her deposition was admitted, *R. v. Ah Pock*, 1 W.W. & A'B., L. 127; *Reg. v. William Hay*, 3 A.J.R. 69. And so in case of insanity of a witness, if it be not merely temporary, *R. v. Marshall*, Car. & Marsh. 147. *R. v. Scaife*, *infra*. If a witness be kept away by the procurement of the prisoner, his deposition will be admissible; but if there be several prisoners, it will be admissible only against the prisoner who has so procured the absence of the witness. If the absence of the witness be from any other cause than those mentioned in this section, or from the above procurement, or insanity, the evidence is inadmissible, *R. v. Scaife*, 5 Cox C.C. 243; 17 Q.B. 238.

Deposition  
not signed.

(*g*) After the death of a witness, his deposition was admitted, though not signed by the justice; it being amongst the other depositions, attached together, and signed once at the end by the justice, *R. v. Parker*, L.R., 1 C.C.R. 225; 39 L.J., M.C. 60.

(*h*) The deposition need not have been taken on the same identical charge; a technical difference will not exclude it. Where the depo-

sition was taken on a charge of stabbing, it was admitted in a trial for manslaughter, *R. v. Dilmore*, 6 Cox C.C. 52. And so where taken on a charge of wounding with intent to do grievous bodily harm, it was used on a trial for murder, *R. v. Beeston*, *ibid.* 425; 24 L.J., M.C. 5.

PART V.,  
§ 81, 82.

81. Where any witness who has been called and examined before the justices by and on behalf of a party committed or held to bail happens to die before the trial, if the party on trial so require, the deposition of such witness may be read in evidence to the jury in the defence of such party.

Depositions  
of prisoner's  
witnesses  
dying before  
trial.

82. After the examination (*i*) of all the witnesses on the part of the prosecution as aforesaid has been completed, the justices by or before whom such examination has been so completed as aforesaid shall without requiring the attendance of the witnesses read or cause to be read to the accused the depositions taken against him; and shall say to him these words or words to the like effect—"Having heard the evidence do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so. You have nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to you to induce you to make any admission or confession of your guilt; but whatever you say will be taken down in writing and may be given in evidence against you upon your trial." And whatever the prisoner then says (*j*) in answer thereto shall be taken down (*k*) in writing and read over to him, and shall be signed by the said justices and kept with the depositions of the witnesses, and shall be (*l*) transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person the same may if necessary be given in evidence against him without further proof thereof, unless it be proved that the justices purporting to sign

Statement of  
prisoner.  
*Ib.* s. 18.

Second  
Schedule,  
Form xxi.

PART V.,  
§ 82.

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the same did not in fact sign the same. Provided that nothing herein contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged made at any time (*m*) which by law would be admissible as evidence against such person.

Statements  
before conclu-  
sion of case  
without  
caution.

(*i*) The prescribed caution is only intended to apply to the examination of the accused at the conclusion of the case for the prosecution; and any statement voluntarily made previously in the course of the examination, is admissible without any previous caution; and it is immaterial whether it was made before, during, or after a remand, *R. v. Stripp*, 1 Dears. C.C. 648; 25 L.J., M.C. 109. The prisoner's statement, under the former portion of the prescribed caution, was admitted against him, though after it there had been a remand and further evidence, after which he declined to make any statement, *R. v. Bond*, 19 L.J., M.C. 138; *R. v. Sansome*, *ibid.* 143; 14 Jur. 466; and the caution that the prisoner has nothing to fear from any threat, or to hope from any promise, is unnecessary where there has been no such promise or threat, *ibid.*

Statement  
inadmissible.

(*j*) The accused must not be sworn; and if his statement, signed by the justice, purport to have been sworn before him, evidence is not admissible to show that he was not in fact sworn, *R. v. Rivers*, 7 C. & P. 177. If the justice return, with the depositions, that the prisoner declined to say anything, it cannot be shown that he made a confession of guilt under examination before the justice, *R. v. Walter*, *ibid.* 267.

Duty of  
justice to  
receive  
statement.

(*k*) The prisoner is not to be entrapped into making a statement, but if he is willing to make one, it is the duty of the justice to receive it, after disabusing him of any impression that it may be used for his own benefit, and with the further caution prescribed, *R. v. Arnold*, 8 C. & P. 621; *R. v. Green*, 5 C. & P. 312; *R. v. Taylor*, 8 C. & P. 733.

Depositions  
for the  
accused.

(*l*) All the depositions taken before the justice ought to be returned, those for the prisoner as well as those against him, and whether the witnesses were bound over or not, *R. v. Fuller and Taylor*, 7 C. & P. 269; *R. v. Simons*, 6 C. & P. 540; and the statement of the prisoner previously, when he was a witness against another person charged with the same offence should be returned, *ibid.* Nothing should be returned as a deposition against the prisoner, unless he had an opportunity of knowing what was said, and of cross-examining the witness, *R. v. Arnold*, *supra*.

His previous  
statements.

(m) Evidence of a previous confession is admissible, even if the accused has been induced to confess, unless the inducement has been by, or in the presence of, some person in authority, *e.g.*, a constable, or the master or mistress of the accused, *R. v. Taylor, supra*. The justices may question the prisoner, and his answers are admissible, if there were no undue influence, *R. v. Bartlett*, 7 C. & P. 832; *R. v. Ellis*, Ry. & Mo. 432. Where the mother of one of two infant prisoners had told them, as good boys, to tell the truth, their confession was admitted in evidence against them, *Reg. v. Reeve and Hancock*, L.R., 1 C.C.R. 362.

PART V.,  
§ 83, 84.

Evidence of  
previous  
confession.

83. The room or building in which such justices take such examinations and statement as aforesaid shall not be deemed an open court for that purpose; and such justices in their discretion may order that no person shall have access to or be or remain in such room or building without their consent or permission, if it appear to them that the ends of justice will be best answered by so doing.

Exclusion of  
strangers.  
11 & 12 Vict.  
c. 42, s. 19.

84. The justices before whom any such witness is examined as aforesaid may bind by recognizance the prosecutor and every such witness to appear at the next sitting of the Supreme Court in its criminal jurisdiction or circuit court or court of general sessions of the peace at which the accused is to be tried, then and there to give evidence against the party accused; which said recognizance shall particularly specify the profession occupation or trade of every such person entering into or acknowledging the same, together with his christian and surname and the township or place of his residence; and if his residence be in a city town or borough, the recognizance shall also particularly specify the name of the street and the number (if any) of the house in which he resides, and whether he is owner or tenant thereof or a lodger therein; and the said recognizance, being duly acknowledged by the person so entering into the same, shall be subscribed by the justices before whom the same is acknowledged;

Recognizance  
of witnesses,  
&c.  
Ib. s. 20.

Second  
Schedule,  
Form xxii.



PART V.,  
§ 85, 86.

Second  
Schedule,  
Form xxiii.

and a notice thereof signed by the said justices shall at the same time be given to the person bound thereby; and the said justices shall deliver or cause to be delivered as soon as possible after the conclusion of the case to the Crown Solicitor or to a clerk of the peace as the case may require the several recognizances so taken together with the written information (if any) the depositions the statement of the accused and the recognizance of the bail (if any).

Documents  
transmitted  
to Crown  
Solicitor or  
clerk of the  
peace, how  
dealt with.

85. After the transmission of the documents as aforesaid to the Crown Solicitor or to a clerk of the peace and before the day of trial, such Crown Solicitor or clerk of the peace shall have and be subject to the same duties and liabilities in respect to the said several documents upon a *certiorari* directed to him or upon a rule or order directed to him in lieu of that writ as the justices would have had and been subject to upon a *certiorari* to them if such documents had not been so transmitted; and the Crown Solicitor or clerk of the peace or the officer in any case prosecuting on behalf of the Crown shall at any time after the opening of the court at the sittings at which the trial is to be had deliver the said several documents or any of them to the proper officer of the court, if and when the presiding judge thereat shall so direct.

Commitment  
of witnesses  
not entering  
into recog-  
nizances.  
11 & 12 Vict.  
c. 42, s. 20.

Second,  
Schedule,  
Form xxiv.

Prosecutor  
committed.

86. If any such witness (*n*) refuse to enter into or acknowledge such recognizance as aforesaid, such justices by their warrant may commit him to the gaol nearest or most convenient to the place in which the accused party is to be tried, there to be imprisoned and safely kept until after the trial of such accused party unless in the meantime such witness duly enter into such recognizance as aforesaid before some justice.

(*n*) If a prosecutor refuse to be bound over to prosecute, the justices may commit him also, if it appear that he can give material evidence, 2 Hawk. P.C. 54.



87. If afterwards from want of sufficient evidence in that behalf or other cause the justices before whom such accused party has been brought do not commit him or hold him to bail for the offence with which he is charged, such justices or any other justice by his or their order in that behalf may order and direct the keeper of the gaol where such witness is so in custody to discharge him from the same, and such keeper shall thereupon forthwith discharge him accordingly.

PART V.,  
§ 87, 88.

If accused party be not sent for trial, imprisoned witness may be discharged. *Ib.* s. 20.

Second Schedule, Form xxv.

88. If from the absence of witnesses or from any other reasonable cause it become necessary or advisable to defer the examination or further examination of the witnesses for any time, the justices before whom the accused appears or is brought may by their warrant from time to time remand (o) the party accused for such time as by them in their discretion shall be deemed reasonable (p) (not exceeding eight clear days) to the gaol in or nearest or most convenient to the place for which such justices are then acting; or if the remand be for a time not exceeding three clear days, such justices may verbally order the constable or other person in whose custody such party accused then is or any other constable or person named by the said justices in that behalf to continue or keep such party accused in his custody, and to bring him before the same or such other justices as shall be there acting at the time appointed for continuing such examination. Provided that any such justices may order such accused party to be brought before them or before any other justice at any time before the expiration of the time for which such accused party shall be so remanded; and the gaoler (q) or officer in whose custody he then is shall duly obey such order.

Remand of accused. *Ib.* s. 21.

Second Schedule, Form xxvi.

(o) A prisoner may be remanded, though the offence was committed in England, and even if no warrant have arrived, *R. v. Davis*, 1 A.J.R. 1. Offences committed abroad.

PART V.,  
§ 89, 90.

(*p*) A justice committing the defendant for an unreasonable or unauthorised period, is liable in trespass, *Davies v. Capper*, 10 B. & C. 28.

Too long a  
remand.

Who to bring  
up prisoner.

(*q*) The gaoler is to give up the prisoner to the officer who brings the order of the justices; it would not be proper for them to order the gaoler to bring him up, *Leverick v. Mercer*, 14 Q.B. 778; 22 L.J., M.C. 89.

Bail of  
accused  
during  
examination.  
Ib. s. 21.

89. Instead of detaining the accused party in custody during the period for which he shall be so remanded, any justice before whom such accused party so appears or is brought may discharge him upon his entering into a recognizance with or without sureties at the discretion of such justice conditioned for his appearance at the time and place appointed for the continuance of such examination.

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Schedule,  
Forms xxvii.,  
xxviii.

Bailing  
persons  
charged with  
felony  
and mis-  
demeanors.  
Ib. s. 23.

90. Where any person appears or is brought before a justice charged with any felony, or with any assault with intent to commit any felony, or with any attempt to commit any felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty or upon any person acting in his aid, or with neglect or breach of duty as a peace officer, or with any indictable misdemeanor, such justice may in his discretion (*r*) admit such person to bail upon his procuring and producing such surety as in the opinion of such justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence; and thereupon such justice shall take the recognizance of the said accused

Second  
Schedule,  
Forms xxix.,  
xxx.

person and his sureties conditioned for the appearance of such accused person at the time and place of trial and that he will then surrender and take his trial and not depart the court without leave.

PART V.,  
§ 91.

(r) The duty of the justices in regard to taking bail, is essentially Taking bail, a judicial, and not ministerial, and therefore, under sec. 162 (*post*), in an judicial act. action against them for refusing it where it ought to have been granted, malice must be alleged and proved, *Linford v. Fitzroy*, 13 Q.B. 240; 18 L.J., M.C. 108. If it be refused, it may be granted by the superior court (or in vacation by a judge thereof), see 4 Broom & Hadley's Commentaries, 392, and the cases cited there; 4 Stephen's Commentaries, 436 (5th ed.). Denying, delaying, or obstructing bail, where it ought to be granted, is a misdemeanour, not only by statute, but by the common law, and is punishable by action or by indictment, 2 Hawkins P.C. Bk. 2, ch. 15, sec. 13. By stat. 1 W. & M., Sess. II., ch. 2, it is declared that excessive bail ought not to be required. On the other hand, under 27 Ed. I. c. 3, justices taking insufficient bail are liable to be fined, if the prisoner do not appear, 2 Hawk. P.C. Bk. II. c. 15, sec. 6. The discretion of the justices is to be guided, not by the Discretion as character and conduct of the accused but, by the probability of his to bail. appearing to take his trial, as determined by the nature of the crime charged, the severity of the punishment which may be imposed, and the probability of a conviction, *re Robinson*, 23 L.J., Q.B. 286; *Baronet's Case*, 22 *ib.* M.C. 25; 1 E. & B. 1. Where a defendant was charged with using seditious language, and the justices refused to accept as bail two persons of sufficient means, on the ground that Character of they had attended Chartist meetings—the Court, while strongly cen- bail. suring their conduct as an illegitimate exercise of their office, refused to allow a criminal information, as they had acted in a belief that they were performing their duty. But the Court imposed the costs of the application upon the justices, *R. v. Badger*, 4 Q.B. 468; 12 L.J., M.C. 66.

(s) Bail in the superior courts have a right to take their principal Right of bail and render him at any time, *R. v. Hughes*, 3 C. & P. 373. And as to apprehend. the principal is always considered to be in the custody of his bail, the latter may arrest him even when returning from giving his evidence in a court, *ex parte Lyne*, 3 Stark. 132. But it would seem otherwise in case of bail taken in inferior courts, *R. v. Hughes, supra*.

91. Where a person charged with any indictable offence is committed to prison to take his trial for the same, the justices who have signed the warrant for his commitment at any time afterwards and before the first Bail after commitment for trial. 11 & 12 Vict. c. 42, s. 23.

PART V.,  
§ 92.

Second  
Schedule,  
Form xxxi.

Persons  
admitted to  
bail, and  
suspected of  
an intention  
to abscond,  
may be  
arrested.

day of the sitting or session at which he is to be tried or before the day to which such sitting or session is adjourned may in their discretion admit such accused person to bail in manner aforesaid; or if such committing justices be of opinion that for any of the offences hereinbefore mentioned the said accused person ought to be admitted to bail, they shall certify on the back of the warrant of commitment their consent to such accused party being bailed, stating also the amount of bail which ought to be required; and any justice attending or being at the gaol or prison where such accused party is in custody may on production of such certificate admit such accused person to bail in manner aforesaid. When any person accused of any treason felony or misdemeanor shall have been admitted to bail by any court judge or person having authority in that behalf and any person shall give information on oath to any justice of any facts which raise a probable presumption that it is the intention of such accused person not to surrender himself in accordance with the condition of the bail bond entered into by him or on his behalf such or any other justice may issue a warrant for the apprehension of such accused person and may commit him to gaol to be there safely kept notwithstanding his having been admitted to bail as aforesaid until he shall be thence delivered by due course of law.

Accomplices. (t) It was said by Patteson, J., that accomplices should never be allowed to go on bail, notwithstanding that it is intended that they should give evidence for the prosecution; because they are so likely to abscond, *R. v. Beardmore*, 7 C. & P. 497.

Proceedings  
where surety  
cannot attend  
at gaol.  
1b. s. 23.  
Second  
Schedule,  
Form xxxii.

92. If it be inconvenient for the sureties in such a case to attend at such gaol or prison to join with such accused person in the recognizance of bail, the committing justices may make a duplicate of such certificate as aforesaid; and upon the same being produced



to any justice such last-mentioned justice may take the recognizance of the surety or sureties in conformity with such certificate; and upon such recognizance being transmitted to the keeper of such gaol or prison and produced together with the certificate on the warrant of commitment as aforesaid to any justice attending or being at such gaol or prison, such last-mentioned justice may thereupon take the recognizance of such accused party and may order him to be discharged out of custody as to that commitment as hereinafter mentioned.

PART V.,  
§ 93-95.

93. Where such accused person in custody is admitted to bail by a justice other than the committing justices as aforesaid, such justice so admitting him to bail shall forthwith transmit the recognizances of bail to the committing justices or one of them, to be by him or them transmitted with the examinations to the crown solicitor or to a clerk of the peace as the case may require.

Transmission  
of recog-  
nizances.  
11 & 12 Vict.  
c. 42, s. 23.

94. No justice shall admit any person to bail for treason; nor shall such person be admitted to bail except by order of a law officer or by the Supreme Court or a judge thereof in vacation.

Bail in cases  
of treason.  
Ib. s. 23.

95. Where justices admit to bail any person who then is in any prison charged with the offence for which he is so admitted to bail, such justices shall send to or cause to be lodged with the keeper of such prison a warrant of deliverance under their hands and seals requiring the said keeper to discharge the person so admitted to bail if he be detained for no other offence; and upon such warrant of deliverance being delivered to or lodged with such keeper, he shall forthwith obey the same.

Writ of  
deliverance.  
Ib. s. 24.

Second  
Schedule,  
Form xxxiii.



PART V.,  
§ 96, 97.Discharge or  
commitment  
of prisoner.  
1b. s. 25.

96. When all the evidence offered upon the part of the prosecution against the accused party has been heard, if the justices then present be of opinion that it is not sufficient to put such accused party upon his trial for any indictable offence, such justices shall forthwith order such accused party if in custody to be discharged as to the information then under inquiry; but if in the opinion of such justices such evidence (*u*) be sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise a strong or probable presumption of the guilt of such accused party, such justices shall by their warrant (*v*) commit him to some one of Her Majesty's gaols in the colony, to be there safely kept until he be thence delivered by due course of law, or admit him to bail as hereinbefore mentioned.

Second  
Schedule,  
Form xxxiv.Depositions  
for accused.

(*u*) Section 81 seems to imply that the accused may always, if he please, call and examine witnesses in his defence, and that their depositions are to be taken and returned in the same way as those for the prosecution, but not to be used at the trial, unless he require it.

Warrant to be  
in writing.  
Information.

(*v*) The warrant must be drawn up *in writing* as soon as possible, otherwise the justice committing, will be liable in trespass, *Hutchinson v. Lowndes*, 4 B. & Ad. 118. And so, if there be no information, *Morgan v. Hughes*, 2 T.R. 225.

Conveying  
prisoners to  
gaol.  
1b. s. 26.

97. The constable or any of the constables or other persons to whom the said warrant of commitment is directed shall convey such accused person therein named or described to the gaol or other prison mentioned in such warrant, and there deliver him together with such warrant to the gaoler keeper or governor of such gaol or prison; who shall thereupon give such constable or other person so delivering such prisoner into his custody a receipt for such prisoner, setting forth the state and condition in which such prisoner was when he was delivered into the custody of such gaoler keeper or governor.

Second  
Schedule,  
Form xxxv.

98. Where any person charged with any indictable offence is committed or held to bail by any justices or committed by any coroner, if the person so committed or bailed, at any time after the examinations in his case have been concluded and before the first sitting of the court at which he is to be tried, (*w*) make application to the officer having the custody thereof such person shall receive from such officer copies of the depositions on which he has been committed or bailed and of the evidence given on the cross-examination or the examination of any witnesses that have been cross-examined or called and examined by or on behalf of the person so committed or bailed.

PARTS V., VI.,  
§ 98-100.

Copies of  
depositions.  
*Ib.* s. 27.

(*w*) This right is given only where the party has been bailed or committed for some offence for which he is *to be tried*, and does not exist where he has been committed to prison in default of finding sureties to keep the peace, and has been discharged by the general sessions. But if the justices think fit, they may allow it, *ex parte Humphreys*, 19 L.J., M.C. 189 ; 4 New Ses. Cas. 179.

Right to  
copies, only  
where  
commitment  
for trial.

## PART VI.—PROCEDURE IN SUMMARY JURISDICTION.

99. Every complaint and information shall be heard tried determined and adjudged by one justice or two or more justices as shall be directed by the Act of Parliament upon which such complaint or information is framed or such other Act of Parliament as there may be in that behalf; and if there be no such direction in any such Act of Parliament, such complaint or information may be heard tried determined and adjudged by any one justice.

By whom  
complaints  
are to be  
heard.  
11 & 12 Vict.  
c. 43, s. 12.

100. The room or place in which any justice sits to hear and try any complaint or information shall be deemed an open and public court to which the public generally may have access so far as the same can conveniently contain them; and the party against whom

Justices' room  
an open court  
and counsel or  
attorney may  
be heard.  
*Ib.* s. 12.

PART VI.,  
§ 101.

such complaint is made or information laid shall be admitted to make his full answer and defence thereto and to have the witnesses examined and cross-examined by counsel (*x*) or attorney on his behalf; and every complainant or informant in any such case shall be at liberty to conduct such complaint or information respectively and to have the witnesses examined and cross-examined by counsel.

Attorney in  
contempt.

(*x*) Justices may not refuse to hear a practitioner because of a contempt committed on a former occasion, see *re Fawcner, ex parte M'Kean* and *ex parte Cory*, *ante* sec. 39, notes. Although it is for the benefit of suitors, and for the satisfactory administration of justice, that counsel should be instructed by an attorney, there is no rule of *law* by which it can be enforced, *Doe dem. Bennett v. Hale*, 19 L.J., Q.B. 353.

Counsel  
without  
attorney.

(*y*) Any person may attend as a friend of either party, may take notes, quietly make suggestions, and give advice (in courts of petty sessions); but he may not act as advocate (unless he comes within this section, or sec. 42, *ante*), *Collier v. Hicks*, 2 B. & Ad. 669.

Assistance of  
a friend.

Proceedings  
where  
defendant  
is not present  
at time of  
hearing.  
*Ib.* s. 13.

101. Where at the day and place appointed in the summons (*z*) aforesaid for hearing and determining any complaint or information the defendant against whom the same has been made or laid does not appear (*a*) when called, the constable or other person who shall have served him with the summons in that behalf shall then declare (*b*) upon oath in what manner he served the said summons; and if it appear to the satisfaction of the justices that he duly (*c*) served the said summons, such justices may proceed to hear and determine the case in the absence of such defendant, (*d*) or may if they think fit issue their warrant in manner hereinbefore directed and shall adjourn the hearing of the said complaint or information until the said defendant be apprehended; and when such defendant is afterwards apprehended under such warrant, he shall be brought before the same or some other justices who shall thereupon by their warrant

commit such defendant to the nearest or most convenient gaol, or if they think fit verbally to the custody of the constable or other person who shall have apprehended him or to such other safe custody as they deem fit, and order the said defendant to be brought up at a certain time and place before such justice or justices as shall then be there, of which said order the complainant or informant shall have due notice.

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§ 101.

Second  
Schedule,  
Form xxxvi.

(z) This section does not apply to a summons after conviction.  
*Bessell v. Wilson*, *infra*.

(a) Appearance by counsel or attorney is sufficient, and in such case a warrant ought not to issue, *Bessell v. Wilson*, 1 E. & B., at p. 499 ; 22 L.J., M.C., 94.; *R. v. Hull*, 3 A. J.R. 29. By counsel.

(b) Before the Amending Act, No. 319, the constable who served the summons upon the defendant must be in court to prove service ; and where the justices received his affidavit, the court granted a rule *nisi* for *certiorari*, *R. v. M'Intyre, exp. Hill, Argus*, March 28th, 1867. But now sec. 2 of the above Act makes the affidavit admissible. See that section following sec. 65 *ante*, which it repeals. Proof of service.

(c) Where the summons was not actually served, the order was quashed on *certiorari*, *R. v. Clissold, ex parte Normoyle, Argus*, Dec. 10th, 1866. The reasonableness of the notice and service are matters for the justices to determine, and where they determined the case on some of the charges without evidence, and without the appearance of the defendants except to ask for an adjournment which was refused, the court refused a *certiorari*, *ex parte Hopwood*, 4 New Ses. Cas. 174 ; 15 Q.B. 121 ; 19 L.J., M.C. 197. And further as to service, see sec. 65 Reasonableness of notice, question for justices.

(k), (l). Where service had not been made until the day before the hearing, at the defendant's residence, after he had started on a journey—and the justices proceeded with the hearing, although an adjournment was asked on his behalf—the court would not grant a prohibition, but censured the proceeding as harsh and arbitrary, and refused the justices their costs, *re Balcombe, ex parte Hann*, 1 W. & W., L. 50. Refusal of adjournment.  
But where the application for, and refusal of, the adjournment were after the case was begun and evidence taken, the justices were allowed their costs, *ex parte Beilby, re Wedge*, 1 W. & W., L. 282. Appearance cures all defects in preliminary process, *Taylor v. Clemson*, 11 Cl. & Fin. at p. 643. *R. v. Dyer*, 1 Salk. 181. *Turner v. Postmaster-General*, 5 B. & S. 756 ; 34 L.J., M.C. 10 ; and 13 W.R. 89 ; 11 L.T. (N.S.) 369, *nom. Shepherd v. Postmaster-General*. *R. v. Stone*, 1 East. at p. 649. *R. v. Shaw*, 34 L.J., M.C. 169. Waiver of notice or service by appearance.



PART VI.,  
§ 102, 103.

(d) Though the justices have authority to determine a case in the absence of a defendant who has been duly served, yet where an attorney appeared for him and pleaded not guilty, without authority; and thereupon they convicted, the conviction was quashed, *R. v. Aves*, 24 L.T. (N.S.) 64 (Q.B.)

Attorney  
pleading  
without  
authority.

Proceedings  
where  
plaintiff is not  
present at  
time of  
hearing.  
Ib. s. 13.

102. Where upon the day and at the place so appointed the defendant attends voluntarily in obedience to the summons in that behalf served upon him or is brought before the said justices by virtue of any warrant, if the complainant or informant having had such notice as aforesaid do not appear by himself his counsel or attorney, the said justices shall dismiss such complaint or information, unless for some reason they think proper to adjourn the hearing of the same unto some other day upon such terms as they think fit; in which case such justices may commit the defendant in the meantime to the nearest or most convenient prison or to such other custody as they think fit, or may discharge him upon his entering into a recognizance with or without surety at their discretion conditioned for his appearance at the time and place to which such hearing is so adjourned.

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Schedule,  
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xxxvii.  
xxxviii.

Where both  
parties are  
present case  
to be heard.  
11 & 12 Vict.  
c. 43, s. 13.

103. If both parties appear either personally or by their respective counsel or attorneys before the justices who are to hear and determine the complaint or information, then the justices shall proceed to hear (e) and (f) determine the same.

Nonsuit.

(e) The justices may nonsuit the complainant upon the opening statement of his counsel, *re Tyers, ex parte Howden, Argus*, June 24th, 1863.

Conclusive-  
ness of the  
determina-  
tion.

(f) A previous dismissal of the same case is not conclusive in a second inquiry before the same or other justices; and where a bastardy summons was dismissed on the merits, upon the evidence of a witness who was afterwards convicted of perjury in the evidence given by him on that occasion, the Court refused to quash an order made upon a second hearing, *R. v. Gaunt*, L.R., 2 Q.B. 466; 36 L.J., M.C. 89, *nom. R. v. Grant*; but the justices, upon a second



inquiry, ought to attach so much weight to the previous decision as to make it, in ordinary cases, practically conclusive, *ibid.* But if the justices on the first occasion have given the defendant a certificate under sec. 107, that will be conclusive. Where an appeal is not expressly given, the decisions of justices are final (as far as appealing goes), *Parsons v. Blandy*, Wightwick 22. An adjudication of the justices, dismissing the case, is not conclusive in a court of mines, *Sim v. Eddy*, 3 W.W. & A'B., L. 21. But where they decide in favour of the complainant, and make an order for payment of money, that is conclusive (as far as their courts are concerned); for where money has been recovered by the judgment of a court of competent jurisdiction, the matter can never be brought over again by a new action, *Moses v. Macferlan*, 2 Burr. 1009.

PART VI.,  
§ 104, 105.

104. Where the defendant is present at the hearing, the substance of the information or complaint shall be stated to him and he shall be asked if he have any cause to show why he should not be convicted or why an order should not be made against him as the case may be; and if he thereupon admit (*g*) the truth of such information or complaint and show no cause or no sufficient cause why he should not be convicted or why an order should not be made against him as the case may be, the justices present at the said hearing shall convict him or make an order against him accordingly.

Proceedings  
at hearing  
when the facts  
are admitted.  
Ib. s. 14.

(*g*) A confession of a charge, to be effectual to warrant a conviction, should not only agree with the charge, but should admit such specific facts as amount to the complete offence; for the confession admits only the charge, but not the effect of it, *R. v. Little*, 1 Burr. 609; *R. v. Smith*, 3 Burr. 1475. As confession supplies the want of evidence, so it cures any objection to the manner of taking the depositions—*e.g.*, that the evidence taken before the accused confessed, was not taken in his presence, *R. v. Hall*, 1 T.R., 320; and excludes any defence to the information which he, in fact, had, *Mann v. Davers*, 3 B. & Ald. 103.

Effect of  
confession

105. If the defendant do not admit the truth of such information or complaint as aforesaid, then the justices shall proceed to hear the prosecutor or complainant and such witnesses (*h*) as he may examine

Proceedings  
at hearing  
when the  
facts are not  
admitted.  
Ib. s. 14.

PART VI.,  
§ 105.

and such other evidence (*i*) as he may adduce in support of his information or complaint respectively, and also to hear the defendant and such witnesses as he may examine and such other evidence as he may adduce in his defence, and also to hear such witnesses as the prosecutor or complainant may examine in reply if such defendant have examined any witnesses or given any evidence other than as to his the defendant's general character; but the prosecutor or complainant shall not be entitled to make any observations in reply upon the evidence given by defendant nor shall the defendant be entitled to make any observations in reply upon the evidence given by the prosecutor or complainant in reply as aforesaid; and every witness at any such hearing shall be examined upon oath, and the said justices having heard what each party has to say as aforesaid and the witnesses and evidence so adduced shall consider the whole matter and determine the same, and shall convict (*j*) or make an order upon the defendant or dismiss (*k*) the information or complaint (as the case may be).

Mode of  
taking  
evidence.

(*h*) Witnesses must be sworn before, and not after, they give their evidence, *R. v. Kiddy*, 4 D. & R. 734. It is not essential that depositions should be taken in the summary jurisdiction; it would be impossible to take them in all cases, *R. v. Call, ex parte Fisher*, 1 N.C. 57. If the defendant appear, an information on oath is not necessary to warrant a conviction, *R. v. Millard*, Dears. C.C. 167; the rule of law is that, unless a statute requires it, an information need not be on oath, or even in writing, per Park, B., *ibid.*, *Ryan v. McCrae, Argus*, March 22nd, 1864, where the defendant appeared without objection.

Admissibility  
of evidence.

(*i*) The admissibility of evidence before the justices is governed by the general legal rules of evidence. Where a summons by the justices to produce documents (which is not equivalent to a *subpœna duces tecum*) was disobeyed, it was held that they were not at liberty to receive secondary evidence, *R. v. Orton*, 7 Q.B. 120; 14 L.J., M.C. 89. They are not required to hear evidence which ought not to affect their determination — *e.g.*, in a charge for selling beer without a license, evidence as to how a license held by the defendant had been

obtained, *R. v. Minshull*, 1 N. & M. 277. The evidence of an accomplice is not only admissible, but sufficient, without any corroboration, for a conviction, if he be believed, *R. v. Atwood*, 1 Leach C.C. 464; *R. v. Hastings*, 7 C. & P. 152. Where the justices refused to convict upon the uncorroborated evidence of an informer, a long time having elapsed between the laying of the information and the prosecution, the Court, on an appeal case, upheld their decision, *Stubley v. Hays*, *Argus*, March 22nd, 1865. They are not to refuse to hear a case, on a recollection of a previous order made by them in the same matter—they must not assume its existence without proof, *R. v. Bridgman*, 2 New Ses. Cas. 232; 15 L.J., M.C. 44. *Sim v. Eddy*, 3 W.W. & A'B., L. 21, where it was held also that a previous decision of justices was not conclusive in a court of mines. A minute that a case was dismissed must be taken to mean—not that it was not entertained but, that it was entertained and dismissed. If the former be meant, it should be so expressed, *ibid*.

PART VI.,  
§ 105.

Accomplice.

Second  
hearing of  
same case.

(j) Where two or more persons are charged with an offence which may be committed by two or more, it is in the discretion of the justices, whether they shall be tried together, or separately, though the information be jointly against them; but there must be separate convictions, *R. v. Littlechild*, *R. v. Heslop*, L.R., 6 Q.B. 293; 24 L.T. (N.S.) 233. The conviction must be for the same offence as that charged, *Martin v. Pridgeon*, *ante* sec. 70 (s). The information is that which gives the justices their jurisdiction, and that must show what is necessary to give jurisdiction, *Wiles v. Cooper*, 3 A. & E. at p. 531, per Littledale, J. It would seem that the absence of the informant would not invalidate the conviction, *Fairbairn v. Riley*, *Argus*, 7th December, 1866.

Requisites of  
conviction.

(k) If a case be proved, the justices ought not to dismiss it on account of mitigating circumstances. Under the Thistle Act, No. 250, sec. 4, the justices "may suspend conviction" if it be proved that the defendant is using reasonable exertions to destroy the thistles; but the Court held that the justices were wrong in dismissing the case in these circumstances, *Metcalfe Shire Council v. Mitchell*, *Argus*, 8th April, 1869. There is a sufficient hearing on which to ground a dismissal, and a certificate thereon, under sec. 107, when a charge has been made, a summons issued, and the defendant attends; although the complainant had given written notice to the defendant and to the justices' clerk that he withdrew from the charge, *Vaughton v. Bradshaw*, 9 C.B. (N.S.) 103; 30 L.J., C.P. 93; and for dismissal with costs, *R. v. Cavston*, 4 Dowl. & Ry. 445; *R. v. Stamper*, 1 Q.B. 119; 10 L.J., M.C. 73. It would seem that there is a trial of the case, when the justices decide that their jurisdiction is ousted, *R. v. Pedler*, 12 L.T. (N.S.) at p. 18, per Cockburn, C.J. But where an information was dismissed, as being preferred by an

Mitigating  
circumstances

Where charge  
withdrawn.

PART VI.,  
§ 106.

unauthorised person, it was held that the justices might hear the case, on an information by a proper party, afterwards, *Foster v. Hull*, 20 L.T. (N.S.) 483.

Proceedings  
in case of  
conviction or  
order.

Ib. s. 14.

*Repealed as  
follows.*

Second

Schedule,

Forms xxxix.

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106. *If the justices convict (l) or make an order against the defendant, a minute or memorandum thereof shall then be made for which no fee shall be paid; and the conviction (m) or order shall afterwards be drawn up (n) by the said justices in proper form under their hands and seals; and the same shall be lodged (o) with the clerk of petty sessions and shall be by him filed and preserved.*

No. 319,  
passed 6th  
Sept., 1867.

3. The one hundred and sixth section of "*The Justices of the Peace Statute 1865*" shall be and the same is hereby repealed, and in lieu thereof the following shall from the passing of this Act be and be deemed to be and may be cited as the one hundred and sixth section of the said statute (that is to say):—"If the justices convict (l) or make an order against the defendant, a minute or memorandum thereof shall then be made, for which no fee shall be paid; and the conviction (m) or order shall afterwards be drawn up (n) by the said justices in proper form under their hands and seals; and the same shall be lodged (o) with the clerk of the peace, and shall be by him filed and preserved."

Proceedings  
in case of  
conviction  
or order.

Ib. s. 14.

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XXXIX.-

XLIV.

Distinction  
between  
orders and  
convictions.

(l) The distinction between an order and a conviction is now very narrow, and it is questionable whether there is any substantial difference. When an order is drawn up, it is conclusive, until quashed, as to the facts recited in it, *re Devaney*, 3 W.W. & A'B., L. 103; *R. v. Justices of Radnorshire*, 9 Dowl. P.C. at p. 98; though, where they are distinguishable, a conviction should be construed strictly, and an order liberally, *ibid.*, *R. v. Cheshire Justices*, post sec. 111 (e). An order may be good in part, and bad for the residue; and it may be quashed on *certiorari* as to the bad part only, *R. v. Robinson*, 17 Q.B. at p. 471; and it may be enforced as to the good part, *ex parte Coley*, 4 New Ses. Cas. 507; *R. v. Green*, 20 L.J., M.C. 168; *R. v. Adams*, *ex parte Ewart*, ante sec. 41 (e). But not so with a conviction, it is entire, *R. v. Catherall*, 2 Str. 900; *R. v. Salomons*, 1 T.R. 249. But where an indictment (and it is presumed, a convic-



tion) contains mere surplusage, and facts constituting a complete offence are sufficiently stated without such superfluous words, the indictment is not bad if the surplusage be erroneously stated ; as where it charged that the defendant made a false declaration before a justice that he had lost a pawn ticket, when in truth he had not lost it, and then went on to state, in an alternative and inconsistent manner, that he had sold, lent, or deposited it, &c., *R. v. Parker*, L.R. 1 C.C.R. 225.

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§ 107.

Surplusage.

(*n*) A variance between the minute and the conviction, does not necessarily invalidate the conviction, *Fairbairn v. Riley, Argus*, Dec. 7, 1866. Variance.

(*n*) A copy of the minute may be served, and a distress warrant issued thereupon, though the order be not formally drawn up till afterwards, *Ratt v. Parkinson*, 20 L.J., M.C. 208. On a rule for prohibition, the conviction, or order should be drawn up and produced to the Court, or at least the minute or memorandum of it, *re Lewis*, 6 W.W. & A'B., L. 1. But where the general sessions affirmed a conviction, though no minute had been filed, the Court, on a special case, affirmed the order of the general sessions, *Sargenti v. Drummond, Argus*, April 9th, 1866. If the statute imposing the penalty, give the justices a discretion as to the manner or the proportions in which it is to be distributed, the conviction should provide specifically for its distribution ; it is insufficient if it direct the penalty to be disposed of "as the law directs," *R. v. Dimpsey*, 2 T.R. 96 ; the judgment is an entire thing, and one part of it cannot be given at one time and another at a subsequent time, *ibid.* But where the penalty is to go, half to the informer, and half to the parish, such a direction will be sufficient, as the distribution is sufficiently certain, *R. v. Helps*, 3 M. & S. 331, the informer and the parish both being stated. An action may be maintained upon an order of justices. An action of debt is maintainable to enforce the judgment of competent courts of inferior jurisdiction, whether of record or not ; and it is sufficient to state that the cause of action arose within the jurisdiction, without stating that the defendant resided within its limits, *Williams v. Jones*, 13 M. & W. 628 ; 14 L.J., Ex. 145. Order—drawing up. On prohibition. Distribution of penalty. Action upon order of justices.

(*o*) If the justices neglect or refuse to lodge a conviction with the clerk of the peace, a mandatory rule (under sec. 138) may be issued against them, but not against their clerk, as he is only their servant, *ex parte Hayward*, 3 B. & S. 546 ; 32 L.J., M.C. 89. See further as to convictions, sec. 73, notes, *ante*. Filing convictions.

107. If the justices dismiss (*p*) such information or complaint, such justices (if they think fit (*q*) and be required so to do) may make an order of dismissal of Proceedings in case of dismissal. Ib. s. 14.



PART VI.,  
§ 107.Second  
Schedule,  
Forms xlv.  
xlv.

the same, and shall give (*r*) the defendant in that behalf a certificate thereof; which said certificate afterwards upon being produced without further proof shall be a bar (*s*) to any subsequent information or complaint for the same matters respectively against the same party.

(*p*) As to what is a dismissal, see sec. 105 (*k*).

Exercise of  
discretion.

(*q*) Where justices have a discretion as to doing an act, the court will not order them to do it, when they have exercised the discretion given them by law, on the merits of the matter, *R. v. King's County*, 8 Ir. C.L.R. (N.S.) 50. But where they refused because they thought the operation of the statute affecting the matter was unjust, a rule was made absolute (with costs) ordering them to do it, *R. v. Boteler*, 4 B. & S. 959; 33 L.J., M.C. 101.

Certificate, by  
whom signed.

(*r*) Such a certificate is sufficient if it purport to be signed by an officer having the custody of the records; and a certificate of a previous conviction was held sufficient, though signed by a deputy clerk of the peace, *R. v. Parsons*, L.R., 1 C.C.R. 24; 35 L.J., M.C. 167. In England (under 9 Geo. IV. c. 31, s. 27, as to assaults), upon a dismissal of the complaint—unless it were because the information was preferred by the wrong person, *Foster v. Hull*, 12 L.T. (N.S.) 482—the justices are bound to grant a certificate forthwith. It was held that the grant was thus a merely ministerial act which the justices were bound to do; that forthwith meant upon application, and that it might be applied for at any time, *Costar v. Hetherington*, 1 E. & E. 802; 28 L.J., M.C. 198. But under this statute it is discretionary, and therefore a judicial act upon which the discretion should be exercised in the presence of both parties—otherwise it would be invalid, *Hancock v. Somes*, 1 E. & E. 795; 28 L.J., M.C. 196.

When to be  
applied for.

(*s*) A dismissal by justices, and a certificate thereon, is no bar to a suit in the County Court, in the same matter between the same parties, *R. v. Skinner, re Ryan v. Francis*, 4 W.W. & A'B., L. 39; *Henty v. Egan, Argus*, 9th July, 1868. A certificate of dismissal of a complaint before justices, for an assault, under 9 Geo. IV. c. 31, secs. 27 & 28, was held a bar to an indictment for a different offence arising out of the same matter, *R. v. Elrington*, 1 B. & S. 688; 31 L.J., M.C. 14. But, as was pointed out in *R. v. Skinner, supra*, that statute makes the certificate a bar to *all proceedings*, civil or criminal, upon the same matter; while this section applies only to proceedings before justices.

When dis-  
missal is a  
bar to further  
proceedings.

(*s*) A dismissal by justices, and a certificate thereon, is no bar to a suit in the County Court, in the same matter between the same parties, *R. v. Skinner, re Ryan v. Francis*, 4 W.W. & A'B., L. 39; *Henty v. Egan, Argus*, 9th July, 1868. A certificate of dismissal of a complaint before justices, for an assault, under 9 Geo. IV. c. 31, secs. 27 & 28, was held a bar to an indictment for a different offence arising out of the same matter, *R. v. Elrington*, 1 B. & S. 688; 31 L.J., M.C. 14. But, as was pointed out in *R. v. Skinner, supra*, that statute makes the certificate a bar to *all proceedings*, civil or criminal, upon the same matter; while this section applies only to proceedings before justices.

108. (t) If any information or complaint negative (u) any exemption exception proviso or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative (v); but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same.

PART VI.,  
§ 108, 109.

The existence of any exception from a statute if denied to be proved by defendant. 11 & 12 Vict. c. 43 s. 14.

(t) Before this enactment (in this and previous Acts), it was necessary for the complainant to allege *and prove* the non-existence of any exception in the enacting clause creating a forfeiture or penalty, *R. v. Pratten*, 6 T.R. 559; *Thibault v. Gibson*, 12 M. & W. 88; but where the exception was merely by proviso, quite distinct from, and unconnected with, the enacting clause, its non-existence need not have been alleged or proved, *Steel v. Smith*, 1 B. & Ald. 94.

Proof of exception.

(u) The information must negative the exception, though the proof of it lies on the defendant; as in an indictment for a coinage offence under an enactment of which our Criminal Law and Practice Statute, No. 233, Sec. 269, is an exact counterpart, *R. v. Harvey*, L.R. 1 C.C.R. 284; 23 L.T. (N.S.) 857. The presumption in favour of innocence of a criminal charge does not apply to proceedings for penalties; so that where it was proved that the defendant was carrying on business on a goldfield, it was held that it was for the defendant to prove that he had a license, and not for the complainant to prove the negative, *McCormack v. Murray*, 2 W. & W., L. 122. Where a water company was convicted in penalties for not keeping its pipes charged with water, it was held that the informer need not prove that the default was not within the exceptions as to drought, &c.; and the Court intimated that the cases in note (v), *infra*, would not be followed, except upon precisely the same enactment, *Bendigo Waterworks Co. v. Fletcher*, 2 V.R., L. 43; 2 A.J.R. 40.

Exception to be negated in information, and proved by defendant.

(v) Where an Act forbade the sale of wine, &c., during certain hours on Sunday, except as refreshment for travellers, it was held that the complainant must prove that the persons to whom the defendant was charged with selling liquor, were not travellers, *Davis v. Scrase*, L.R., 4 C.P. 172; 38 L.J., M.C. 79. *Morgan v. Hedger*, L.R., 5 C.P. 485. *Copley v. Burton*, *ibid.* 489.

English Acts, sale of liquor on Sundays. Travellers.

109. (w) Before or during the hearing of any information or complaint, the justices present in their discretion (x) may adjourn the hearing of the same to a

Adjournment of hearing. Ib. s. 16.

PART VI.,  
§ 110.

certain time (*y*) and place to be then appointed and stated in the presence and hearing of the party or parties or their respective attorneys or agents then present; and in the meantime the said justices may suffer the defendant to go at large or may commit (*z*) him to the nearest or most convenient gaol or to such other safe custody as they shall think fit, or may discharge such defendant upon his entering into a recognizance with or without sureties at the discretion of such justices conditioned for his appearance at the time and place to which such hearing or further hearing is adjourned.

Adjournment. (*v*) Even without this section, justices would have power to adjourn in any case which they had power to hear, *R. v. Mayor of Clonmel*, 9 Ir. C.L.R. (N.S.) 267.

Should be granted on reasonable request.

(*x*) An adjournment should be granted if it be necessary; as where the defendant has not in fact had sufficient notice to prepare his defence and procure the attendance of his witnesses; and where it was refused in such circumstances, the Court (while refusing a prohibition) declared such refusal to be harsh and arbitrary, and refused costs to the justices, *re Balcombe ex parte Hann*, 1 W. & W., L. 49. But there is not the same obligation where the adjournment is not applied for until the case has been partly heard, *ex parte Beilby, re Wedge, ibid.* 281.

Repeal of an Act meanwhile.

(*y*) If the Act giving jurisdiction to the justices be repealed before the day to which the case is adjourned, their jurisdiction over it ceases, *R. v. Justices of London*, 3 Burr. 1456, unless the repealing Act save all proceedings already commenced.

Remand where no actual offence.

(*z*) A man was brought before a justice, and charged on oath with travelling upon a railway without a ticket, and remanded to a subsequent day. In the meantime it was discovered that the offence had not been committed, and thereupon he was discharged; it was held that the justice was warranted in committing him to prison under this section, *Gelen v. Hall*, 2 H. & N. 379; 27 L.J., M.C. 78, although the Act applying to the case did not give authority to issue a warrant before conviction.

Proceedings when either party is not

110. If at the time and place to which such hearing or further hearing is so adjourned either or both of the par-

ties do not appear (a) personally or by his or their counsel or attorneys respectively before the said justices or such other justices as are then there, the justices then there present may proceed to such hearing or further hearing as if such party or parties were present; or if the prosecutor or complainant do not appear, the said justices may dismiss such information or complaint with or without costs as to them seems fit.

PART VI.,  
§ 111.

present at  
adjourned  
hearing.  
Ib. s. 16.

(a) In the superior courts, unless in an application for *habeas corpus*, where the liberty of the subject is concerned, a wife cannot appear for her husband; where there was no other appearance for the plaintiff, he was nonsuited, *Cobbett v. Hudson*, 15 Q.B. 988; 14 Jur. 982. See also notes to section 42 as to other modes of appearance.

Appearance  
by wife for  
husband.

111. In all cases of conviction where no particular form of such conviction is or shall be given by the statute creating the offence or regulating the prosecution for the same, and in all cases of conviction upon statutes hitherto passed whether any particular form of conviction have been therein given or not, the justices who so convict may draw up their conviction (b) on parchment or on paper in such one of the forms of conviction in the second schedule hereto as is applicable to such case or to the like effect.

Form of  
conviction.  
Ib. s. 17.

(b) The conviction must show all things necessary to give jurisdiction—*e.g.*, it must state a complete offence proved, and that the defendant was found within the jurisdiction, otherwise the justices may leave themselves open to an action of trespass, *Johnson v. Reid*, 6 M. & W. 124. An omission to negative lawful excuse where it might exist, invalidates a conviction, *ex parte Hawkins*, 2 B & C. 31. As to other requisites and defects of a conviction, see *ante* sec. 73, notes. It must be for the same offence as that stated in the summons. A summons under one statute, for assaulting a constable in the execution of his duty, will not support a conviction for a common assault under another, *R. v. Brickhall*, 33 L.J., M.C. 157; see also *ante* sec. 70(s), sec. 105 (j). A conviction for gaming in a public place, to wit, a railway carriage, was held bad for not alleging that the carriage was travelling along the railway, *re Freestone*, 1 H. & N. 93; 25 L.J., M.C. 121; 2 Jur. (N.S.) 525.

Validity of  
conviction.



PART VI.,  
§ 112-114.

(c) As to the difference between convictions and orders, see *ante* sec. 106 (*l*). In a conviction, evidence is set out, upon which a Court of appeal may form a judgment; in an order none is stated, *R. v. Justices of Cheshire*, 5 B. & Ad. 439. An adjudication, under 11 Geo. II. ch. 19, sec. 4, inflicting penalties for fraudulently removing goods to avoid a distress, is an order, and not a conviction, *Ibid.*

Difference between conviction and order.

Classification of convictions and orders.

(d) This section is intended to embrace all cases, under a three-fold division; first, where the penalty under the conviction is to be levied (in default of payment) by distress, and, in default of a sufficient distress, imprisonment; secondly, where, in default of immediate payment, imprisonment is imposed; thirdly, where the punishment is by imprisonment only. And in the case of orders, the same division is followed—*per* Coleridge, J., *R. v. Hyde*, 21 L.J., M.C., at p. 96; 16 Jur. 337; S.C. 7 E. & B. 859 (*n*). And see Forms in Second Schedule, 39-44.

Form of order.  
Ib. s. 18.

112. Where an order is made (*e*) and no particular form of order is or shall be given by the statute giving authority to make such order, and in all cases of orders to be made under the authority of any statutes hitherto passed whether any particular form of order be therein given or not, the justices by whom such order is to be made may draw up the same in such one of the forms of orders in the second schedule to this Act contained as may be applicable to such case or to the like effect.

Date of order.

(e) An order is made when it is pronounced, and the time for appeal runs from that day, though it be not drawn up until afterwards, and when drawn up, it is dated as of the day when pronounced; it is not invalidated by the justices signing it on different days, *exp. Johnson*, 3 B. & S. 947; 32 L.J., M.C. 193. See further as to orders, *ante* sec. 111 (*d*) and see 106, notes.

Forms of informations complaints &c.

113. Every information complaint order and warrant shall be deemed valid and sufficient in which the subject-matter thereof shall be set forth in the words of the Act upon which the same respectively may have been framed.

Award of costs to prosecutor or

114. In all cases of summary (*f*) conviction or of orders (*g*) made by justices, the justices making the



same may in their discretion award and order in and by (h) such conviction or order that the defendant shall pay to the prosecutor or complainant respectively such costs as to them seem just and (i) reasonable in that behalf. PART VI.,  
§ 115.  
complainant.  
11 & 12 Vict.  
c. 43, s. 18.

(f) The power of justices to award costs, exists only where they have summary jurisdiction: Where they dismissed a charge of perjury, with costs, a prohibition was granted, *R. v. Daly*, 6 W.W. & A'B., L. 76. Only in  
summary  
jurisdiction.

(g) A determination by justices to issue a warrant for payment of rates, is not a conviction or order; and it would seem that no costs could be awarded on such warrant, *R. v. Fraser*, 3 W.W. & A'B., L. 3. On warrant  
for rates.

(h) The amount of costs awarded must be specified in the order or conviction, *R. v. Symonds*, 1 East. 188. So directed by sec. 116.

(i) "Costs, as between party and party, are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a *bonus* to the party who receives them," *Harold v. Smith*, 5 H. & N., at p. 385; 29 L.J., Ex. 141. They must be of a reasonable amount. Where the justices fixed them at an altogether unreasonable sum, as an indirect means of coercing the defendant, the Court granted a prohibition, with costs, *R. v. Panton, re Bobardt v. Munro*, 1 A.J.R. 37. Costs  
merely an  
indemnity.

115. In cases where such justices instead of convicting or making an order as aforesaid dismiss (j) the information or complaint, they may in their discretion in and by their order of dismissal award and order that the prosecutor or the complainant respectively shall pay to the defendant such costs as to such justices seem just and reasonable (i). Or to  
defendant.  
*Ib.* s. 18.

(j) Where a Court declines to entertain a case, upon a preliminary objection—*e.g.*, for want of jurisdiction—no costs are given, *Fraser v. Fothergill*, 14 C.B. 298; *Conway v. Richardson*, 10 L.T. (N.S.) 853. Preliminary objection, no costs.  
Upon a fraud summons the justices dismissed the summons, with costs, upon the refusal of the plaintiff to pay the defendant's expenses as a witness. The Court held this decision right, except as to giving costs on the dismissal, *O'Donoghue v. Hamilton*, 3 A.J.R. 32.

PART VI.,  
§ 116, 117.

Recovery of  
costs.

Ib. s. 18.

116. The sums so allowed for costs shall in all cases be specified in the conviction or order or order of dismissal; and the same shall be recoverable in the same manner and under the same warrants as any penalty or sum of money adjudged to be paid in and by such conviction or order is to be recoverable; and in cases where there is no such penalty or sum to be thereby recovered, such costs shall be recoverable by distress and sale of the goods and chattels of the party and in default of such distress by imprisonment with or without hard labour for any time not exceeding one month unless such costs be sooner paid.

Warrant of  
distress.

Ib. s. 19.

117. Where a conviction adjudges a pecuniary penalty or compensation to be paid, or where an order (*k*) requires the payment of a sum of money (*l*) and by the statute authorizing such conviction or order such penalty compensation or sum of money is to be levied upon the goods (*m*) and chattels of the defendant by distress and sale thereof, and also in cases where by the statute in that behalf no mode of raising or levying such penalty compensation or sum of money or of enforcing the payment of the same is stated or provided, the justices making such conviction or order or any justice having jurisdiction in the same place may issue his or their warrant (*n*) of distress for the purpose of levying the same; and such warrant of distress shall be in writing under the hand and seal of the justice-making the same; and if after delivery of such warrant to the constable or constables to whom the same shall have been directed to be executed sufficient distress shall not be found within the limits of the jurisdiction of the justice granting such warrant, then upon proof alone being made on oath of the handwriting of the justice granting such warrant before any justice having jurisdiction in any other place such last-mentioned justice shall thereupon make an endorsement on such

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xlvi. xlix.

warrant signed with his hand authorising the execution of such warrant within the limits of his jurisdiction; and by virtue of such warrant and endorsement the penalty or sum aforesaid and costs, or so much thereof as may not have been before levied or paid, shall be levied by the person bringing such warrant, or by the person to whom such warrant was originally directed, or by any constable or other peace officer, by distress and sale of the goods and chattels of the defendant in such other place.

PART VI.,  
§ 117.

(k) Such warrant may issue, though the order be not formally drawn up, *Matt v. Parkinson*, 20 L.J., M.C. 208. Before order drawn up.

(l) Where the conviction was silent as to costs, a warrant of distress for the penalty and a sum for costs, renders the justices issuing it, liable to an action of trespass, *Leary v. Patrick*, 15 Q.B. order. 266; 19 L.J., M.C. 211; 4 New Ses. Cas. 258.

(m) Shares in a company are not goods, *Knight v. Barber*, 16 M. & W. 66; 16 L.J., Ex. 18; nor are they chattels, and they cannot be seized and sold under an execution, *Eddy v. Working Miners Gold Mining Co.*, 2 W.W. & A'B., Eq. 110. Nor are chattels real within this description, *Tuckett v. Alexander*, 1 W. & W., Eq. at p. 92. What may not be seized.

(n) There ought not to be a summons to the defendant to show cause why a distress warrant should not issue, as there should not be two orders for the same thing; but if this be done, it will not invalidate the proceedings; it is merely an unnecessary formality, *Hart v. Badham*, *Argus*, 4th Sep., 1868. A misrecital of the conviction in the warrant, does not necessarily invalidate it, *Fairbairn v. Riley*, *Argus*, 7th Dec., 1866. Summons to show cause. Misrecital.

(o) Where the conviction does not adjudge imprisonment in default of payment of the penalty, the defendant may be committed afterwards, *R. v. Helps*, 3 M. & S. 331; and so by sec. 122. A conviction or order is not bad for comprising an order for the issue of a distress warrant in default of payment, and imprisonment in default of distress; though a warrant of commitment should not issue without an opportunity to the defendant to show cause against it, *re M. J. Butler*, *Argus*, 6th Dec., 1858; *Warr v. Templeton*, 3 A.J.R. 37. Where a statute renders a party liable to a distress if the penalty be not forthwith paid upon conviction, there need not be any demand.

PART VI., previous to the distress, *Barnes v. White*, 1 C.B. 192; 14 L.J.,  
§ 118, 119. M.C. 65.

Commitment before distress. (p) Where penalties may be levied by distress, an action of trespass lies against a justice who commits the defendant to prison, without any previous attempt to distrain, *Hill v. Bateman*, 2 Str. 710. This section, in conjunction with sec. 123, authorises, in every case in which a penalty is adjudged, imprisonment on default of sufficient distress.

Money and bank-notes may be seized. 118. Where any sum is by this or any other Act or by any warrant of a justice directed to be levied by distress and sale of the goods and chattels of any person, any money or bank notes belonging to such person may be seized taken and applied towards satisfaction of the warrant, but need not be sold.

When distress would be ruinous or no property exists defendant may be in the first instance committed. 11 & 12 Vict. c. 43, s. 19. 119. Where it appears to any justice to whom application is made for any warrant of distress that the issuing thereof would be ruinous to the defendant and his family, or where it appears to such justice by the confession of the defendant or otherwise that he hath no goods or chattels whereon to levy such distress, such justice (if he deem (q) it fit) instead of issuing such warrant of distress may (in cases within the forty-first section of this Act) order the defendant to pay the amount awarded by instalments or may in any case commit (r) the defendant to the nearest or most convenient gaol, there to be imprisoned for such time and in such manner as by law such defendant might be so committed in case such warrant of distress had issued and no goods or chattels could be found whereon to levy such penalty or sum and costs aforesaid.

(q) As to the exercise of the discretion of the justice, see *ante* sec. 107 (q).

Misrecital. (r) Justices may commit for three months, on non-payment of a fine of £10 for an assault, under No. 233, sec. 38, *Morrison v. Clarke*, 2 A.J.R. 17. A misrecital of the conviction in the warrant, does not necessarily invalidate it, *Fairbairn v. Riley, Argus*, December 7th, 1866.



120. Where a justice issues any warrant of distress, he may suffer the defendant to go at large ; or verbally or by a written warrant in that behalf order the defendant to be kept and detained in safe custody until return be made to such warrant of distress, unless the defendant give sufficient security by recognizance or otherwise to the satisfaction of such justice for his appearance before him at the time (s) and place appointed for the return of such warrant or before such other justices as may then be there.

PART VI.,  
§ 120, 121.

On issue of  
distress  
warrant  
defendant  
may be  
detained or  
bailed.  
Ib. s. 20.

(s) Inasmuch as justices have no general power of commitment for an indefinite time, a detention by parol commitment in court, till the return of a warrant of distress which was not returnable on a day certain, is an excess of jurisdiction for which the justices are liable in trespass, *Leary v. Patrick*, 15 Q.B. 274-5, *per* Coleridge and Wightman, Js., S.C., 19 L.J., M.C. 211 ; 4 New Ses. Cas. 258.

Distress  
warrant  
returnable on  
day certain.

121. If any claim be made to or in respect of any goods (t) or chattels distrained under the warrant of any justice or in respect of the proceeds or value thereof by any person not being the party against whom such warrant has issued, any justice upon complaint of the constable (u) charged with the execution of such warrant (as well before as after any action brought against such constable) may issue a summons in the form contained in the Second Schedule hereto, directed as well to the party obtaining such warrant as to the party (v) making such claim; and thereupon any action which has been brought in respect of such claim shall be stayed, and the court in which such action has been brought or any judge thereof, on proof of the issue of such summons and that the goods and chattles were so distrained, may order the party bringing such action to pay the costs of all proceedings had in such action after the issue of such summons; and any two or more justices shall adjudicate on such (w) claim and make an order in the form or to the effect contained in the second schedule hereto; and

Justices may  
adjudicate on  
adverse  
claims to  
goods seized  
under their  
warrant.

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PART VI.,  
§ 122.

every such order unless there be an appeal therefrom under this Act shall be final and conclusive upon all parties.

(t) What may not be seized, sec. 117 (m).

Constable  
parting with  
the goods.

(u) The instant the constable parts with the goods, or their proceeds, he ceases to be a stakeholder, and has no right to an interpleader summons if an action be commenced against him, *Cousens v. McGee*, 4 W.W. & A'B., L. 29.

Real owner  
not bound  
without  
notice.

(v) The real owner is not bound by proceedings under this section, unless he had notice, *Maritime Co. v. Rands*, 1 A.J.R. 79; and in such circumstances the county court is not precluded from trying the case, *ibid.*

Bills of sale.

(w) Justices have jurisdiction, under this section, to go behind a bill of sale duly executed and registered, and to examine whether it be fraudulent and void, *Rashleigh v. Hart, Argus*, 13th Sept., 1866. But where they held a bill of sale to be void because it had no schedule, and fraudulent as preferring one creditor before others, their adjudication was held, on appeal, to be bad on both grounds; as to the latter, that such a preference was not a fraud at common law, but only by the insolvency law, which was not in question before justices, *Robertson v. Bland, Argus*, 7th Dec., 1866. If some of the goods seized are claimed as coming within a clause of the bill of sale as to after-acquired property, the justices should require some evidence of affirmance, as to such property when acquired, by the grantor of the bill of sale, *Dunlop v. Tutty*, 2 V.R., L. 14; 2 A.J.R. 35. The Court upheld an adjudication of justices that a document purporting to sell a house and furniture, and unregistered, but accompanied by an ostensible delivery, was a bill of sale within the Instruments and Securities Statute, No. 204, and ineffectual as being unregistered, *Wangaratta Brewery Co. v. Betts*, 1 A.J.R. 79.

In default of  
distress  
defendant  
committed,  
Ib. s. 21.  
Second  
Schedule,  
Forms l., li.

122. If at the time and place appointed for the return of any warrant of distress, the constable who has had the execution of the same return on oath or otherwise as the justice may direct that he could find no goods or chattels or no sufficient (x) goods or chattels whereon he could levy the sum or sums therein mentioned together with the costs of or occasioned by the levying of the same, the justice before (y) whom the same is returned may issue his warrant of commit-

ment (z) under his hand and seal directed to the same or any other constable, reciting (a) the conviction or order shortly the issuing of the warrant of distress and the return thereto, and requiring such constable to convey the defendant to the nearest or most convenient gaol and there to deliver him to the keeper thereof, and requiring such keeper to receive the defendant into such gaol and there to imprison him or to imprison him and keep him to hard labor in such manner and for such (b) time as shall have been directed and appointed by the statute on which the conviction or order mentioned in such warrant of distress was founded, unless the sums adjudged to be paid and all costs and charges of the distress and also the costs and charges of the commitment and conveying (c) of the defendant to prison if such justice think fit so to order (the amount thereof being ascertained and stated in such commitment) shall be sooner paid.

PART VI.,  
§ 122.

(x) Where the defendant has goods only sufficient to satisfy part of the sum adjudged, they should not be taken, but there should be a commitment; but if such goods be taken, there cannot be a commitment for the residue of the amount, for the law never intended that the defendant should suffer both ways, *R. v. Wyatt*, 2 Raym. at p. 1195. If there be two convictions, and goods sufficient to satisfy one only, they should be taken for that one, *ibid*.

No distress  
for part, and  
commitment  
for residue.

(y) Before commitment there should be an adjudication by a justice (which should be recited in the warrant) that there had been a default of payment, and that it appeared to him that there were no sufficient goods and chattels of the defendant to distrain upon; and thereupon an order of commitment, *re Peter Mavor, Argus*, 12th September, 1867. See also *Warr v. Templeton*, 3 A.J.R. 37, where a summons to show cause was held unnecessary before issuing a warrant of commitment. A conviction was quashed for awarding imprisonment upon default of payment, where a distress warrant was issuable, *R. v. Pasco, ex parte Hudson, Argus*, 28th March, 1868.

Adjudication  
of default  
before  
commitment.

(z) A commitment of two defendants under a joint conviction for an offence several in its nature—*e.g.*, for assault—is bad, and renders the justices liable in trespass, *Morgan v. Brown*, 4 A. & E. 515. Such a commitment is bad also as virtually detaining each defendant

Joint commit-  
ment for  
several  
offence.

PART VI., § 123.	until all the others have paid their penalty, and until the cost of conveying all to prison has been paid, <i>R. v. Cridland</i> , 7 E. & B. 870; 27 L.J., M.C. 32. As the validity of the warrant depends also upon that of the conviction or order, see <i>ante</i> notes to secs. 73, & 106, & 111 ( <i>b</i> ). But now there cannot be any commitment for non-payment of orders upon any of the causes of complaint in sec. 41, or for calls or contributions in mining companies. It has been held that the Legislature, by the Acts No. 284 and No. 292 (abolition of imprisonment for debt), has abolished imprisonment for debt, and withheld the procedure by fraud summons in such cases; and the Court prohibited proceedings before justices upon a fraud summons for contribution at the suit of the official liquidator of a mining company, <i>exp. Adair, re Hart v. Adair</i> , <i>Argus</i> , June 28th, 1866. The defendant may be committed for default, after the affirmance of a conviction by the general sessions, sec. 130, <i>post</i> ; and it would seem that such a commitment would not be bad if it did not state everything which is requisite in the conviction itself; if it recited a conviction in a penalty to be applied as the law directs, it would be intended that the distribution was more particularly specified in the conviction itself, <i>R. v. Helps</i> , 3 M. & S. 331, <i>per</i> Bayley, J. It is proper that the conviction, after imposing the penalty, should go on to state how it is to be enforced, <i>R. v. Call, exp. Fisher</i> , 1 N.C. 57; <i>R. v. Thompson</i> , 1 A.J.R. 23. If the defendant be committed for the penalty only, and pay it, he cannot afterwards be committed for the costs; there cannot be two arrests for the same judgment, <i>Smith v. Dickenson</i> , 5 Q.B. 602; 12 L.J., Q.B. 314. A good warrant of commitment may be substituted for a bad one by the same justices, if it be done before the return to a <i>habeas corpus</i> , <i>re Charles Smith</i> , 3 H. & N. 227; 27 L.J., M.C. 186. <i>R. v. Richards</i> , 5 Q.B. 926. <i>Ex parte Cross</i> , 2 H. & N. 354; 26 L.J., M.C. 201.
Whether orders enforceable by commitment.	
Imperfect recital of affirmed conviction.	
Not two commitments.	
Substitution of good, for bad, warrant.	
Misrecital.	(a) A misrecital of the conviction in the warrant does not necessarily invalidate it, <i>Fairbairn v. Riley</i> , <i>Argus</i> , 7th December, 1866.
Date.	(b) The omission of the date is fatal to a warrant, for a gaoler ought to be able to ascertain from the warrant, how long he is to detain the prisoner, <i>re Fletcher</i> , 1 Dowl. & L. 726; 13 L.J., M.C. 16; 8 Jur. 146.
Costs of conveyance to gaol.	(c) The warrant of commitment is bad if it do not fix the amount of costs of conveying the prisoner to gaol, <i>ex parte Walters, re Kerr</i> (or <i>Curr</i> ), <i>Argus</i> , 28th June, 1866.
Where no remedy is provided for insufficient	123. Where the statute on which any warrant of distress or conviction or order is founded provides no remedy, in case it be returned to a warrant of distress

thereon that no sufficient goods of the party against whom such warrant has been issued can be found, the justice to whom such return is made or any other justice if he think fit may by his warrant as aforesaid commit the defendant to the nearest or most convenient gaol for any term not exceeding three months, unless the sum or sums adjudged to be paid and all costs and charges of the distress and of the commitment and conveying of the defendant to prison, if such justice shall think fit so to order, (the amount thereof being ascertained and stated in such commitment) shall be sooner paid.

PART VI.,  
§ 124.

distress  
defendant  
committed.  
11 & 12 Vict.  
c. 43, s. 22.

124. Where the statute by virtue of which a conviction for a penalty or compensation or an order for the payment of money is made makes no provision for such penalty or compensation or sum being levied by distress, but directs that if the same be not paid forthwith or within a certain time therein mentioned or to be mentioned in such conviction or order the defendant shall be imprisoned or imprisoned and kept to hard labor for a certain time unless such penalty compensation or sum shall be sooner paid, no such penalty compensation or sum shall be levied by distress; but if the defendant do not pay the same together with costs (if awarded) forthwith or at the time specified in such conviction or order for the payment of the same, the justices making such conviction or order or any other justice may issue his or their warrant of commitment under his hand and seal or their hands and seals, requiring the constable or constables to whom the same is directed to take and convey such defendant to the nearest or most convenient gaol and there to deliver him to the keeper thereof, and requiring such keeper to receive such defendant into such gaol and there to imprison him or to imprison him and keep him to hard labor as the case may be for such time as the statute on which

Where no  
distress is  
allowed  
defendant to  
be committed.  
Ib. s. 23.

Second  
Schedule,  
Forms lii, liii.



PART VI.,  
§ 125, 126.

such conviction or order is founded as aforesaid shall direct, unless the sums adjudged to be paid and also the costs and charges of the commitment and conveying the defendant to prison if such justice or justices think fit so to order (the amount thereof being ascertained and stated in such commitment) shall be sooner paid.

If sentence be imprisonment or order be disobeyed defendant to be committed.  
11 & 12 Vict. c. 43, s. 24.

Second  
Schedule,  
Forms liv. lv.

125. Where a conviction does not order the payment of any penalty but orders that the defendant be imprisoned or imprisoned and kept to hard labor for his offence, or where an order is not for the payment of money but for the doing of some other act and directs that in case of the defendant's neglect or refusal to do such act he shall be imprisoned or imprisoned and kept to hard labor and the defendant neglects or refuses to do such act, the justices making such conviction or order or some other justice may issue his or their warrant of commitment under his hand and seal or their hands and seals, requiring the constables to whom the same is directed to take and convey such defendant to the nearest or most convenient gaol and there to deliver him to the keeper thereof, and requiring such keeper to receive such defendant into such gaol and there to imprison him or to imprison him and keep him to hard labor as the case may be for such time as the statute on which such conviction or order is founded as aforesaid directs.

Recovery of costs in such cases.  
Ib. s. 24.

Second  
Schedule,  
Forms lvi.  
lvii. lviii.

126. In all such cases as last aforesaid where by the conviction or order any sum for costs (the amount thereof being ascertained and stated in such commitment) shall be adjudged to be paid by the defendant to the prosecutor or complainant, such sum may (if the justices think fit) be levied by warrant of distress in manner aforesaid; and in default of distress the defendant may (if such justices think fit) be committed to the same gaol in manner aforesaid, there to be impri-



soned for any time not exceeding one month to commence at the termination of the imprisonment he shall then be undergoing, unless such sum for costs and all costs and charges of the said distress and also the costs and charges of the commitment and conveying of the defendant to prison if such justice or justices shall think fit so to order (the amount thereof being ascertained and stated in such commitment) shall be sooner paid.

PART VI.,  
§ 127, 128.

127. Where justices upon any such information or complaint as aforesaid adjudge the defendant to be imprisoned and such defendant is then in prison undergoing imprisonment upon a conviction for any other offence, the warrant of commitment for such subsequent offence shall be forthwith delivered to the gaoler to whom the same is directed; and the justices issuing the same if they think fit may award and order therein and thereby that the imprisonment for such subsequent offence shall commence at the expiration of the imprisonment to which such defendant has been previously (*d*) adjudged or sentenced.

Where defendant is already in prison sentence of imprisonment may be cumulative.  
Ib. s. 25.

(*d*) This section applies equally to a case where a defendant is on the same occasion sentenced for several offences; the sentences may be cumulative; and it was therefore held that where justices imposed two sentences for two similar offences, each of the full period allowed by the statute, they were justified in so doing, *R. v. Frederick Paine*, 16 L.T. (N.S.) 282; *nom, re Paine*, 15 W.R. 742.

Several sentences on same occasion cumulative.

128. Where any information or complaint is dismissed with costs, the sum awarded for costs in the order for dismissal may be levied by distress on the goods and chattels of the prosecutor or complainant in manner aforesaid; and in default of distress or payment such prosecutor or complainant may be committed to the nearest or most convenient gaol in manner aforesaid for any time not exceeding one

Recovery of costs on dismissal of complaint.  
Ib. s. 26.

Second Schedule,  
Forms lix. lx.

PART VI.,  
§ 129-131.

month, unless such sum and all costs and charges of the distress and of the commitment and conveying of such prosecutor or complainant to prison if the justices shall think fit so to order (the amount thereof being ascertained and stated in such commitment) be sooner paid.

Costs or costs  
and charges.

129. Where in any order conviction or order of dismissal any costs or costs and charges shall be awarded ordered or directed to be paid, and where by any warrant they are required to be levied, and where by any warrant any person is to be imprisoned until they are paid, such costs or costs and charges (as the case may be) shall be calculated and ascertained by the scale in the Third Schedule hereto so far as the same is applicable.

Third  
Schedule.

Warrant of  
distress after  
appeal.  
11 & 12 Vict.  
c. 43, s. 27.

130. After an appeal against any conviction or order as aforesaid is decided, if the same be decided in favor of the respondents, the justices who made such conviction or order or any other justice may issue such warrant of distress or commitment as aforesaid for execution of the same as if no such appeal had been brought.

Recovery of  
costs of  
appeal.  
Ib. s. 27.

131. If upon any such (*e*) appeal the court of general sessions order (*f*) either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace (*g*) of the said court to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and if the same be not paid within the time so limited and the party ordered to pay the same be not bound by any recognizance conditioned to pay such costs, such clerk or his deputy, upon application of the party entitled to such costs or of any person on his behalf and on payment of a fee of one shilling, shall grant to the party so apply-

Second  
Schedule,  
Forms lxi.  
lxii. lxiii.

ing a certificate that such costs have not been paid; and upon production of such certificate to any justice he may enforce the payment of such costs by warrant of distress in manner aforesaid; and in default of distress he may commit the party against whom such warrant has issued in manner hereinbefore mentioned for any time not exceeding three months, unless the amount of such costs and all costs and charges of the distress and also the costs of the commitment and conveying of the said party to prison, if such justice think fit so to order (the amount thereof being ascertained and stated in such commitment) be sooner paid.

PART VI.,  
§ 132.

(e) This is a cumulative general authority upon all appeals to give costs. It does not take away any former power, or alter the form of awarding them under such power: it relates only to appeals against summary convictions and other orders mentioned in this statute, and does not extend to appeals against poor-rates, *R. v. Huntly*, 3 E. & B. 172; 23 L.J., M.C. 106.

Cumulative power as to appeals under this statute.

(f) Where there was no order on appeal as to costs, but there was a general rule of the court of general sessions that the party against whom the appeal was decided should pay costs, the justices were upheld in granting a distress warrant on the certificate of the clerk of the peace that the costs had been demanded and were unpaid, though recognisances had been entered into—this being covered by 12 & 13 Vic. c. 45, sec. 5 (which, for this purpose, corresponds with sec. 143, *post*); *Freeman v. Read*, 9 C.B. (N.S.) 301; 30 L.J., M.C. 123.

Costs by general order. Where recognisance exists.

(g) A mistake in ordering costs to be paid directly to the other party to the appeal, instead of to the clerk of the peace, is not a defect of jurisdiction, but merely an erroneous procedure, *R. v. Binney*, 1 E. & B. 810; 22 L.J., M.C. 127.

Order of payment to the party.

132. Where any person against whom a warrant of distress issues as aforesaid pays or tenders to the constable having the execution of the same the sum or sums in such warrant mentioned together with the amount of the expenses of such distress up to the time of such payment or tender, such constable shall cease to execute the said warrant.

On payment of amount due distress warrant to cease.  
Ib. s. 28,

PART VI.,  
§ 133, 134.

Or prisoner to  
be liberated.  
Ib. s. 28.

133. Where any person is imprisoned for non-payment of any penalty or other sum, he may pay or cause to be paid to the keeper of the prison in which he is so imprisoned the sum in the warrant of commitment mentioned together with the amount of the costs charges and expenses (if any) therein also mentioned; and the said keeper shall receive the same, and shall thereupon discharge such person if he be in his custody for no other matter.

Copies of  
proceedings in  
summary  
cases.

134. Where a summary (*i*) conviction or order before or by any justices or justice has been had or made, all parties interested therein shall be entitled to demand and have copies of the information and depositions (*j*) and of such (*k*) conviction or order upon payment for the same to the clerk of petty sessions of the sum mentioned for the same in the Third Schedule hereto.

Third  
Schedule.

(*k*) The defendant was entitled to a copy of the conviction before any enactment to this effect, *R. v. Midlam*, 3 Burr. 1720.

Commitment  
in default of  
sureties.

(*i*) This section would not seem to apply, any more than sec. 98, to the case where the defendant was merely committed in default of finding sureties to appear at the general sessions, and in the meantime to keep the peace towards the applicant, *ex parte Humphreys*, 4 New Ses. Cas. 179; 19 L.J., M.C. 189.

Depositions  
not necessary  
in summary  
jurisdiction,

unless on  
fraud  
summons.

(*j*) It is not *necessary* to take down depositions in cases within the summary jurisdiction, and it would be impossible to do so in every case, *R. v. Call, ex parte Fisher*, 1 N.C. 57. But upon an application for a prohibition, the affidavits should either enclose them or state that there are none, *R. v. Taylor*, 1 V.R., L. 5; 1 A.J.R. 24. But on a fraud summons, the Act No. 284, sec. 9 (abolition of imprisonment for debt) prescribes that the examination of the defendant shall be taken down in writing. This is not merely directory, and the court granted a prohibition against an order, where the examination was not so taken, *R. v. Harker, ex parte Mackie, Argus*, 6th April, 1868.

Amendment  
after giving  
copy,

(*k*) Even after giving the defendant a copy of the conviction, the justices may amend it—before appeal to general sessions, or before sending it up on *certiorari*—in any matter of form, if the facts warrant such amendment; and this is not only legal, but laudable,



and the duty of the justices, *R. v. Barker*, 1 East. 186; *Chaney v. Payne*, 1 Q.B. 712; and apparently this may be done after the conviction has been lodged with the clerk of the peace, *ibid.* But it is too late to amend after the conviction has been quashed on appeal or *certiorari*, or after the defendant, taken under a warrant reciting the bad conviction, has been discharged on *habeas corpus*, on account of such defect; the justices cannot protect themselves from an action by any such attempt, *ibid.*

PART VII.,  
§ 135.

After lodging conviction;

Not after quashing, &c.

## PART VII.—APPEALS MANDAMUS AND PROHIBITIONS.

135. Any court of general sessions of the peace on the application of either the appellant or respondent on the hearing (*l*) of any appeal may state (*m*) a case in respect of such appeal or any question of law arising thereon for the opinion of the Supreme Court; and the applicant shall within fourteen days after receiving (*n*) such case transmit (*o*) the same to the said court (*p*), first (*q*) giving notice in writing of such case having been stated with a copy of the case to the other party; and thereupon the said court shall hear and shall deal (*r*) therewith in the like manner as the Court of Queen's Bench in England deals with cases so stated; and the like proceedings in relation to such case shall be had and taken thereon in the Supreme Court and the court of general sessions as are usually taken in like cases in the Court of Queen's Bench and courts of quarter sessions in England or as near thereto as circumstances will permit; and the Supreme Court may make such order as it thinks proper as to the costs of and occasioned by the hearing of such case.

General sessions may state case for opinion of Supreme Court.

(*l*) The court of general sessions must decide the matter, and then state a case for the Supreme Court; it is wrong to reserve judgment till the opinion of the superior court be obtained, and the latter court will not entertain any such case, *R. v. Kesteven*, 3 Q.B. 810; 1 New Ses. Cas. 151; 13 L.J., M.C. 78. *Fitzpatrick v. Hackett*, 1 W. & W., L. 335. *Fitzgerald v. Naylor*, Vict. L.T. 149. *Clunes United Q. M.*

Decision before stating case.



- PART VII.,  
§ 136.
- 
- Appeal under Health Act. *Co. v. Clunes Borough Council*, 2 W.W. & A'B., L. 96. But where the general sessions quashed a conviction on appeal, and stated a case, concluding that if the Supreme Court should be of opinion that their decision was wrong, further evidence would be taken as to the amount of penalty to be awarded; an objection on this ground was overruled, *Goldie v. Allan, Argus*, 6th April, 1868. An appeal to general sessions upon a dispute between the owner of land and a local board of health (under the Public Health Amendment Act, No. 310, sec. 48), comes within "any other appeal" in sec. 143 *post*, but such appeal lies only as to the amount of compensation; and where the general sessions dismissed, with costs, an appeal by the local board, on the ground that a drain was unnecessary—subject to a special case which was not stated in time—it was held that the sessions had exceeded their jurisdiction and a *certiorari* was granted, *R. v. Pohlman*, 6 W.W. & A'B., L. 109. The confirmation by the general sessions, on appeal, subject to a special case, leaves the order of the justices as it was before appeal, *R. v. Pembrokeshire*, 2 B. & Ad. 391; *Kendall v. Wilkinson*, 4 E. & B. 690; 24 L.J., M.C. 89; it is not an adjournment of the hearing of the appeal, and does not suspend the effect of the order, *ibid.*
- Confirmation subject to a case. *(m)* It would seem that a special case should be stated before the adjournment of the sessions, as well as within the time limited, *R. v. Pohlman, supra.*
- Before adjournment. *(n), (o), (p), (q)* See the cases upon these points, *post* sec. 150 *(j)*, *(m)*, *(n)*, *(o)*.
- Other points than those stated. *(r)* The argument upon the case stated must be confined to the points therein set out. If there be other points arising on the face of the order below, a *certiorari* may be obtained to bring up the original order on the fresh objections, *R. v. Heyop*, 8 Q.B. 547; 15 L.J., M.C. 70. If points taken below be omitted from the case, it may be remitted for amendment, under sec. 156 *post*. In such a case the court granted a rule *nisi* for restatement, but, on the return of the rule, discharged it, as the omission of a condition precedent to the right of appeal rendered a restatement futile, *Gutierrez v. Kofoed, Argus*. Nov. 27th and Dec. 7th, 1866.
- Forms of special case. *(s)* For forms of special case, see *Swan v. M'Lellan*, 2 W.W. & A'B., L. 6; *Hanna v. Seymour Road Board, ibid.* 93; *Clunes United Q. M. C. v. Clunes Borough Council*, 96; *R. v. Hector, ibid.* 124.
- Rule for a prohibition. 136. *(t)* When any person feels aggrieved by the summary conviction or order *(u)* of any justice, he may, within one month *(v)* after such conviction or

order upon showing by affidavit (*w*) a *prima facie* case (x) of error (*y*) or mistake on the part of such justice, apply to the said court (*z*) or any judge thereof for a rule or order (*a*) calling on such justice and the party interested (*b*) in maintaining the conviction or order to show cause to the court why they should not be prohibited from proceeding or further proceeding (as the case may be) upon or in respect of such conviction or order.

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§ 136.

(*t*) This section does not oust the common law prohibition; it is a cumulative remedy, *ex parte, Gaynor, post (b)*. The difference between a prohibition under this section, and a prohibition at common law, is that before the latter can be granted, the Court must be satisfied that the tribunal to be restrained, had no jurisdiction whatever in the matter; while under this section the Court can prohibit, although the justices may have had jurisdiction, if they have not exercised that jurisdiction correctly, *R. v. Pohlman, Argus*, Sept. 3, 1868. Where a judge of a county court made an order, upon a fraud summons, stating, not for which of the causes mentioned in the Act but, that "it appeared to the court that that order ought to be made," and ordered payment in a month, or, in default, a month's imprisonment, a rule for a common law prohibition was discharged, *ibid.* In the case of a plaint beyond the jurisdiction, in a warden's court, the Court would not interfere before the hearing *Reg. v. Warden at Donnelly's Creek*, 3 A.J.R. 38.

(*u*) The conviction or order should be drawn up and produced to the Court, or at least the minute or memorandum thereof, *re Lewis*, 6 W.W. & A'B., L. 1. A prohibition under this section issues only against a conviction or order; a distress warrant is neither, *Hart v. Badham, infra (y)*; nor is a warrant of ejectment, *R. v. Carr*, 1 A.J.R. 1; 6 W.W. & A'B., L. 245; nor is a determination to enforce a rate by warrant, *R. v. Fraser*, 2 W.W. & A'B., L. 3. A prohibition was refused, with costs, against a conviction not yet drawn up, on an information for keeping open a licensed house at an unlawful hour. The only evidence of the sale of liquor was that three persons were in the bar with liquor in drinking vessels before them. The Court held that, though the information was only for keeping the house open, the justices might yet frame a conviction for illegally selling liquor at the time, if there were evidence before them on which they could come to such a conclusion; and the Court could not say that there was no such evidence, *re Hackett, ex parte Simpson, Argus*, March 22, 1865. A prohibition was granted against an order upon an

Conviction to be drawn up.  
Prohibition refused—  
Warrant of distress—  
Ejectment, rates.

Conviction not drawn up.

- PART VII.,  
§ 136.
- Interpleader. interpleader summons, made against mortgagees in their absence, *re Akehurst, ex parte Hodgson, Argus*, Nov. 30, 1866. The conviction must be before the Court, that it may amend it, if the error be amendable; and a rule for a prohibition was refused where the conviction was not drawn up, *R. v. Lavis, Argus*, 24th March, 1869.
- Rule need not allege application within time. (v) The rule *nisi* for prohibition need not allege that the application was made within a month of the decision, *R. v. Howitt, Argus*, March 24th, 1869. It is refused where it *appears* that the application is more than a month after the conviction or order, *R. v. McLachlan, Argus*, Dec. 2, 1868. *R. v. Smith, ex parte Kenny, Argus*, September 6th, 1866, and as this is a preliminary objection, costs are not given, *ibid.*
- Affidavits. (w) If the affidavits on which the rule *nisi* was granted have been lost, the Court, on affidavit of the person who last saw them will allow duplicates to be used, *R. v. Howitt, supra*. The affidavits and order should be entitled, "In the Supreme Court," and not merely as of the cause below; but the Court will amend in that respect, *re Bell, ex parte Slater, Argus*, March 23rd, 1861.
- Title of affidavits.
- Depositions and evidence. (x) On prohibition under this section, the court considers the merits of the case, and for that purpose the depositions must be sent up, *R. v. Hurst*, N.C. 11; *re Orr v. Wilson, ex parte Wilson, Argus*, December 10th, 1858. *R. v. Taylor*, 1 A.J.R. 24. And in civil cases the evidence should be before the Court, *R. v. Langford, ex parte Luth, ibid.* 159. The Court refused to interfere where there was evidence both ways before the justices, *R. v. Templeton, Argus*, March 24, 1869.
- Certiorari. (y) An objection for total want of jurisdiction—as where justices made an order upon a matter arising outside their local jurisdiction—is a matter for *certiorari*, and not for prohibition, *R. v. Hurst, supra* (x). The Court will not grant a prohibition because merely of a harsh or arbitrary refusal of an adjournment, *re Balcombe, ex parte Hann*, 1 W. & W., L. 49. Though there ought not to be two orders for the same thing, a prohibition will not be granted where the defendant has been summoned to show cause why a distress warrant should not issue upon a previous order or conviction, *Hart v. Badham, Argus*, September 4th, 1868. The application will be entertained by the Court only on points which were taken below directly or indirectly, or are manifest upon the face of the case, *R. v. O'Brien*, 3 3 W.W. & A'B., L. 54; *re Mackenzie, ex parte Clarke*, 1 W. & W., L. 135. Where granted on points taken below, costs are given, *R. v. Foster*, 1 W.W. & A'B., L. 8.
- Prohibition, harshness of justices.
- Two orders.
- Points not taken below.
- Costs.
- Prohibition to be applied for before appeal. (z) Where justices proceeded after their jurisdiction had been ousted by a claim of title, an appeal to the sessions should not be tried first, but prohibition should be applied for at once. Where it

was applied for after an unsuccessful appeal, though the Court did not refuse it, no costs were allowed, *R. v. Skinner and Webster*, 1 A.J.R. 151. PART VII.,  
§ 137.

(a) The order *nisi* operates as a stay of all proceedings upon the After order or conviction below, and it may be made absolute after execution. execution. *R. v. Carr*, 1 A.J.R. 1, *supra*; *Jones v. Owen*, 18 L.J., Q.B. 8; 13 Jur. 261; 5 Dowl. & L. 669.

(b) Where the Crown is interested in the penalty, the rule or order Where Crown *nisi* must be served upon the Attorney-General, *ex parte Booth*, 1 interested. N.S.W.R., L. 22; *ex parte Gaynor* (Sup. Ct., N.S.W., Oct. 26th, 1860), Wilkinson's Plunkett's Australian Magistrate, Part III., 98.

137. Where on the return (e) of such rule or (d) Proceedings on return of the rule. order the mistake or error (if any) appears to be amendable, (e) the court shall amend the conviction or order, or if there be no such mistake or error shall affirm such conviction or order, and in either case shall discharge such rule or order with or without payment of costs as to the court seems meet; but where on such return the court after considering the evidence adduced before the justice think that the conviction or order cannot be supported, the court may make such rule or order absolute (f) with or without payment of costs as to the court seems meet.

(e) On the return of the rule or order, it is not proper for the justices Justices not to appear to show cause against it. Where the Court acknowledged to interfere. that a justice so appearing acted under a laudable desire to promote justice, it deemed it so undesirable that justices should interfere at all between the parties, that it refused the justice his costs, though the rule was discharged on the cause shown by him, *re Hodgson, ex parte Hodgson, Argus*, 11th December, 1866. Where a rule was discharged on the affidavit made by one of the justices on behalf of one of the parties, the Court severely censured his conduct, and allowed no costs, *R. v. Brown, Argus*, 28th November, 1867. See also *post* sec. 154 (a).

(d) An order for a prohibition was issued by a judge in vacation, Discharging returnable on the first day of term, and drawn up and served, but order *nisi*. not handed to the prothonotary, nor placed in the list for that day. There was no appearance in support of it. On an application to discharge it if it were a rule *nisi*, or to rescind it if it were a rule absolute,



PART VII., it was held that it was an order *nisi*, but not yet before the Court,  
 § 138. and so could not be discharged; and that even if it were considered  
 an order absolute, it could not be rescinded, because there was nothing  
 to show that it was not a good order. The application was refused,  
*re Pasco, ex parte Medland, Argus*, 27th June, 1867.

Amendment: (e) Striking out the Queen, and inserting other complainants, is too large an amendment for the Court to make, *R. v. Rowe*, 1 V.R., L. 83; 1 A.J.R. 79. But it will reduce the amount of the order to the sum which the justices ought to have awarded, *R. v. Adams, ex parte Ewart*, 1 A.J.R. 160; or by an amount ordered, as to which there was no jurisdiction, *R. v. Williams, Argus*, 24th March, 1868, *ante* sec. 41, (e), (j). See also *R. v. Lavis, ante* sec. 73 (v).

Absolute after execution. (f) The order may be made absolute after execution, as the order *nisi* should have been a stay to all proceedings, *R. v. Carr*, 1 A.J.R. 1; *Jones v. Owen*, 18 L.J., Q.B. 8; 13 Jur. 261; 5 Dowl. & L. 669.

Supreme Court or judge may order justice to act. 11 & 12 Vict. c. 44, s. 5. 138. (g) Where a justice refuses (h) to do any act relating to the duties of his office as such justice, the party requiring such act to be done may apply to the Supreme Court or any judge thereof upon an affidavit of the facts for a rule or order (i) calling upon such justice and also the party to be affected by such act to show cause to the said court why such act should not be done; and if after due service of such rule or order good cause be not shown against it, the court may make the same absolute (j) with or without or upon payment of costs (k), and the said justice upon being served with such rule absolute shall obey the same and shall do the act required; and no action or proceeding whatever shall be commenced or prosecuted against such justice for having obeyed such rule and done such act so thereby required as aforesaid.

Cumulative remedy. (g) This section does not take away the remedy by ordinary *mandamus*, it is cumulative, *R. v. Browne*, 13 Q.B. 654; and it is not operative where a *mandamus* could not be granted, *R. v. Bristol, infra* (i).

Refusal spontaneous. (h) The refusal must be spontaneous; the Court would not grant a rule where the complainant asked the justices to refuse, in order to get the opinion of the Court, *R. v. Paynter*, 7 E. & B. 328; 26 L.J.,



M.C. 102; nor where the justices have dismissed the case, as that is an adjudication, *R. v. Dayman*, *ibid.* 128, 7 E. & B. 672. But a rule was granted where the justices dismissed a complaint upon an invalid preliminary objection, though it was taken in defence and not at the outset of the case; as this was really a declining to exercise their jurisdiction, *R. v. Brown*, *ibid.* 757; 26 L.J., M.C. 183. The section applies to all cases in which justices refuse to do an act relating to the duties of their office—*e.g.*, to take recognisances, *R. v. Aston*, 1 L.M. & P. 491; 19 L.J., M.C. 236; 4 New Ses. Cas. 283. And so where the justices required an unnecessary authority to prosecute, *R. v. Mirehouse*, 32 L.J., M.C. 90. It will not be granted where justices have decided, though wrongly, on a matter of fact within their jurisdiction; the Court will not review such decision, upon a rule to order justices to issue their warrant, *R. v. Dunn*, 7 E. & B. 220; 26 L.J., M.C. 74. Nor does this section apply where the justices have acted, though erroneously—*e.g.*, in drawing up two convictions instead of a joint conviction, *re Clee & Osborne*, 21 L.J., M.C. 112.

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Dismissal,  
On  
preliminary  
objections.

Not where  
justices have  
acted, though  
erroneously.

(i) Before granting it, the Court must be satisfied that the justices have jurisdiction in the matter, *re Hackett, ex parte Wilson*, Vic. L.T. 257 (March 26th, 1857); *R. v. Great Yarmouth*, 4 New Ses. Cas. 313. *R. v. Broderip*, 5 B. & C. 239; 7 Dowl. & R. 861, where it was refused to compel the enforcing, by warrant, of an order, the validity of which was doubtful, *R. v. Colling*, 17 Q.B. 816; 21 L.J., M.C. 73; *R. Deverell*, 3 E. & B. 372; 23 L.J., M.C. 121; *R. v. Tyrwhitt*, 15 Q.B. 249; 19 L.J., M.C. 249; *R. v. Wodehouse*, 15 Q.B. 1037; *R. v. Browne*, 13 Q.B. 654, where it was refused, as the time for appealing had not expired. Where the justices refuse to convict, under an erroneous impression that an Act had been repealed, the Court has no jurisdiction to interfere under this section, where it could not do so by *mandamus* at common law, *R. v. Bristol*, 3 E. & B. 479 (n). Where the justices have a discretion as to acting, the Court will not order them to act, where they have exercised their discretion on the merits of the matter; but where they had refused, because they thought the operation of a statute was unjust, a rule was made absolute, with costs, *R. v. Boteler*, 4 B. & S. 959; 33 L.J., M.C. 101; *R. v. King's County*, 8 Ir. C.L.R. (N.S.) 50. Where they refused to hear an information for perjury, because an ecclesiastical suit, in which it was alleged to have been committed, was still pending, the Court refused a *mandamus*, with costs, *R. v. Ingham*, 14 Q.B. 396; 19 L.J., M.C. 69.

Jurisdiction  
must be  
shown.

Where  
discretion.

(j) Where the time for appeal had expired, a rule was granted to compel the issue of a warrant, though there was a claim of exemption from the highway rate, *Bletchington v. Payton*, 6 Dowl. & L. 288; S.C., *nom. R. v. Oxfordshire*, 18 L.J., M.C. 22. A rule *nisi* to the general sessions was granted, where the appeal was struck out for

Where rule  
granted.

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§ 139, 140.

want of a recognisance though the evidence of the justice was tendered to the effect that it had been entered into and left with him, but afterwards lost, *R. v. Skinner, Argus*, 11th December, 1866. In a case of nuisance which the justices had no jurisdiction to *determine*, and the minute of the justices stated that the case was dismissed for want of jurisdiction, but that they were of opinion that no nuisance existed, the Court ordered them to *hear* the case (under Part V. of this statute), *R. v. Balcombe, re Fowler v. Higgins*, 1 A.J.R. 152.

Costs.

(*k*) The general rule is that the unsuccessful party pays costs, and the court, on that point, will not enter into the merits of the original application, *R. v. Ingham*, 17 Q.B. 884; 21 L.J., M.C. 125.

Appeal to be  
stay of  
proceedings.

139. When under the provisions hereinafter contained any person appeals from the conviction of any justice to the court of general sessions or from the determination of any justice to the Supreme Court, the execution of such conviction or determination shall be stayed and suspended and such person if in custody shall be liberated until the said appeal shall have been determined.

Appeal from  
convictions to  
general  
sessions.

140. Except as hereinafter or by any law now or hereafter in force otherwise expressly provided when any person feels himself aggrieved by the summary conviction (*l*) of any justice by which is imposed any fine or penalty or forfeiture exceeding the sum or value of five pounds or any term of imprisonment exceeding seven days, if he forthwith (*m*) give notice (*n*) of his intention to appeal and enter into the recognizance (*o*) hereinafter directed, he may appeal (*p*) from such conviction to the next (*q*) court of general sessions of the peace.

Conviction  
not filed.

(*l*) The general sessions may hear and determine the appeal, though no conviction or minute has been filed, *Sargenti v. Drummond, Argus*, 9th April, 1866.

Forthwith.

(*m*) "Forthwith" means without any unreasonable delay, without such delay as cannot satisfactorily be accounted for, *R. v. Justices of Worcester*, 7 Dowl. P.C. 789. *Ex parte Lowe*, 2 New Ses. Cas. 331; 15 L.J., M.C. 99. *R. v. Justices of Norfolk*, 3 N. & M. 61; 5 B. &

Ad. 990.—*Grace v. Clinch*, 4 Q.B. 606; 12 L.J., Q.B. 273, and *Leech v. Lamb*, 11 Ex. 437; 25 L.J., Ex. 17, refer to judge's certificates at the trial, and turn upon the word "immediately" after, which, according to *R. v. Justices of Worcester, supra*, is construed more strictly than "forthwith."

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(n) Service of notice of appeal on the clerk to the justices, in their presence, is sufficient, *R. v. Eaves*, L.R., 5 Ex. 75; 39 L.J., M.C. 70. A verbal notice, given immediately after the verbal adjudication and order of the justices, though before the formal order or conviction is drawn up and signed by the justices, is good, as that is the time at or from which the time for appealing begins, and the order or conviction when written purports to be of that date, *R. v. Huntingdonshire*, 4 New Ses. Cas. 101; 19 L.J., M.C. 127. The grounds of appeal need not, necessarily, be set out in writing, *Watson v. Riley, Argus*, 4th July, 1868.

(o) It is not necessary to enter into the recognisance on the spot; it is sufficient if it be done promptly and expeditiously, according to the circumstances of the case, *R. v. Aston*, 4 New Ses. Cas. 283; 1 L.M. & P. 491; 19 L.J., M.C. 236.

(p) Both the conditions—giving notice, and entering into recognisances—are conditions precedent to the right of appeal, *R. v. Justices of Oxfordshire*, 1 M. & S. 449.

(q) The "next court of general sessions" does not comprise an adjournment of such sessions, *R. v. Surrey*, 1 M. & S. 479. An ordinary adjournment of such court operates only upon the disposal of the business actually before the court at the time, *per Mellor, J.* But in this case the application to the adjourned sessions was held good, as the statute affecting it contemplated the adjourned sessions, *R. v. West Riding Justices, Drake's Case*, L.R., 5 Q.B. 33. Where a rule of the court of general sessions requires notice to be given a certain time before the sessions, the appeal will not be allowed to a subsequent sessions, if it were practicable to give the notice in time for the next sessions, *R. v. Sevenoaks*, 1 New Ses. Cas. 595; 7 Q.B. 136; 14 L.J., M.C. 92.

141. Every person (r) making such appeal shall before some justice enter into a recognizance to Her Majesty in double the amount (s) of the penalty (if any) adjudged to be paid, or (if there be no such penalty or if the same be less than the sum next hereinafter mentioned) in the sum of twenty pounds, with two sufficient (t) sureties with a condition to prosecute such

Recognizances on appeal.

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appeal with effect and to submit to the determination of the said court of general sessions and pay such costs as may be awarded by the same; or shall in lieu of such recognizance deposit in the hands of the clerk of petty sessions the said amount or sum (as the case may be) on the like condition.

Recognisance of corporate body.

(r) The recognisance of an incorporated company appealing, must be by itself, under its corporate seal; it cannot enter into it by its manager, *Pride and Stringer's Company v. Conisbee*, 2 A.J.R. 57. Nor can a president and council of a shire (complainants), by the secretary of the shire, *Logan v. Stevens*, 3 A.J.R. 65.

Recognisances not forwarded.

(s) The jurisdiction over the appeal arises only on compliance with the statutory requirements. In an appeal from justices to general sessions, the recognisances were not forwarded by the justices' clerk. On this appearing, the appeal was struck out, and the order of justices affirmed. The Court granted a mandatory order to the general sessions to hear the appeal, and held that the absence of any proof that the fees had been paid was immaterial, as the clerk ought not to have taken the recognisances if the fees were not paid, *Reg. v. Pohlman, ex p. Cobb*, 3 A.J.R. 38. A recognisance for too large an amount—as

Amount of recognisance.

for twice the penalty where it was between £10 and £20—is as bad as one for too little; the objection is fatal, *Gutierrez v. Kofoed, Argus*, December 11th, 1866. Where the penalty is less than £20, however small the amount, the recognisance must be for £20; where the penalty is greater than £20, the recognisance must be for double the penalty; and in no case may it include the costs, *O'Dea v. Clayton*, 2 W. & W., L. 252. *Anderson v. Luth*, 1 A.J.R. 78. *Cook v. McCullagh, ibid.* 153; *Perkins v. O'Toole, ibid.* 78; *Powell v. Taylor, ibid.*

Discretion as to sufficiency of sureties.

(t) The justice must exercise a discretion as to the sufficiency of the person entering into the recognisance. Where another justice took the defendant's recognisance as a matter of course, without any inquiry as to his sufficiency, the Court held that the justice who had heard the case was not bound to state a special case, and refused a rule under sec. 153, *re Alley, ex parte Freame, Argus*, 4th July, 1867. Appearance by counsel or attorney was held to satisfy the condition of the recognisance for the appearance of the defendant on an appeal from a conviction for wilful exposure, *Reg. v. George Hull* (one of the sureties), 3 A.J.R. 29.

No appeal in cases of larceny.

142. No person liable to conviction before justices for simple larceny under any law now or hereafter in force in Victoria shall appeal from such conviction to any court of general sessions.



143. The said court of general sessions shall hear and determine (*u*) the matter (*v*) of the said appeal; and shall make such order (*w*) in relation to the matter and as to costs (*x*) in such appeal and in any other appeal (*y*) that may by law come before it as to the court may seem fit; and the decision of such last-mentioned court shall be final (*z*) to all intents and purposes; and all costs awarded by any such court in cases of appeal may be recovered in a summary manner before any justice.

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§ 143.

General  
sessions  
decide appeal.

(*u*) Where a court of general sessions refused to entertain an appeal which it ought to have heard—*e.g.*, where no recognisance was produced, but the evidence of the justice who took it was tendered, to the effect that it had been entered into before him, left with him, and afterwards lost—the Court granted an order *nisi* to the sessions to hear the appeal, *R. v. Skinner ex parte Hennessy, Argus*, 11th December, 1866; and a *mandamus* may issue, *R. v. Salop*, 1 G. & D. 146; 2 Q. B. 85; 5 Jur. 1107; but it must (in the absence of very special circumstances) be applied for within the Term next after the refusal, *R. v. Recorder of Richmond*, E. B. & E. 253; 27 L.J., M.C. 197. The appeal may be heard and determined, though neither the conviction nor the minute has been filed, *Sargenti v. Drummond, Argus*, 9th April, 1866.

Loss of  
recognisance.

*Mandamus*  
to hear.

(*v*) The appeal to general sessions is only from convictions, under sec. 140. The appeal from orders is to the Supreme Court, under sec. 150, as shown by sec. 139.

From convictions only.

(*w*) A confirmation of the order of the justices by the general sessions, subject to a special case for the Court, leaves the order as it was before the confirmation, *R. v. Pembrokeshire*, 2 B. & Ad. 391. *Kendall v. Wilkinson*, 4 E. & B. 690; 24 L.J., M.C. 89; it is not an adjournment of the hearing of the appeal, and does not suspend the effect of the order, *ibid*.

Stating a  
case, no  
suspension,  
or adjourn-  
ment.

(*x*) The power of awarding costs seems not so large as that given by 12 & 13 Vic. c. 45, sec. 5. Under that enactment a court of general sessions has jurisdiction, if it think fit, to impose costs upon the appellant, where the appeal is dismissed for want of jurisdiction. *R. v. Padwick*, 8 E. & B. 704; 27 L.J., M.C. 113. Where the sessions, in default of appearance by the appellant, confirmed the order, which, in the circumstances, was beyond their jurisdiction to do (the notice of appeal having been countermanded, though the countermand was

Costs.



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§ 144.

too late for that session) and awarded costs; the order for costs shared the fate of the rest of the order. But, *semble*, the costs of the day might properly have been given, *R. v. Stoke Bliss*, 6 Q.B. 158; 13 L.J., M.C. 151. Where the order for the costs of the appeal was made without stating the amount, which was left to be settled by the clerk of the peace, and by him reported to the court at an adjourned sitting at which all the same justices were not present, and was then drawn up regularly, it was held that the order was good, *R. v. Mortlock*, 7 Q.B. 459; 14 L.J., M.C. 153. At the hearing of an appeal nothing was said about costs; but there was a rule of the sessions that the costs should be taxed by the clerk of the peace at the same sessions, and be paid by the party against whom the appeal should be decided, unless ordered otherwise. It was held that a warrant might issue for enforcing payment; and although the taxation had taken place out of the sessions, the appellant was not allowed to maintain this objection, as both parties had consented to it, *Freeman v. Read*, 9 C.B. (N.S.) 301; 30 L.J., M.C. 123. This power to give costs applies whether there be recognizances or not, *ibid.*

"Any other  
appeal."

(y) "Any other appeal" embraces an appeal under the Public Health Amendment Act, No. 310, sec. 49, in a dispute as to compensation between a local board of health and the owner of land taken for a drain, *R. v. Pohlman*, 6 W.W. & A'B., L. 109. But in such an appeal, the general sessions have nothing to do with the question whether the drain was necessary, *ibid.* In such "other appeals" the amount in dispute need not reach the *minimum* prescribed in sec. 140, *ibid.*; and in such appeals there is no power, under this statute, to give costs; the power given, applies only to appeals from justices, *ibid.*

Altering  
judgment.

(z) A court of general sessions may alter its judgment during the continuance of the same sessions, *R. v. Justices of Leicestershire*, 1 M. & S. 442.

No technical  
objection to  
appeal.  
12 & 13 Vict.  
c. 45, s. 3.

144. Upon the hearing of an appeal to any court of general sessions, no objection on account of any defect in the form of setting forth any ground of appeal shall be allowed; and no objection to the reception of legal evidence offered in support of any grounds of appeal shall prevail, unless the court be of opinion that such ground of appeal is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement and to prepare for trial.

145. Where the said court is of opinion that any objection to any ground of appeal or to the reception of evidence in support thereof ought to prevail, such court if it think fit may cause any such ground of appeal to be forthwith amended by some officer of the court or otherwise on such terms as to payment of costs to the other party or postponement of the trial to another day in the same or the next subsequent sessions or both payment of costs and postponement as to such court shall appear just and reasonable.

PART VII.,  
 § 145-148.

Grounds of  
 appeal may  
 be amended.

*Ibid.*

146. If in any notice of appeal to any court of general sessions the appellant have included any ground of appeal which shall in the opinion of such court be frivolous or vexatious, such appellant shall be liable, if the court think fit and irrespective of the result of such appeal, to pay the whole or any part of the costs incurred by the respondent in disputing any such ground of appeal.

Frivolous  
 ground of  
 appeal.

*Ib. s. 4.*

147. Every such court, upon proof of any notice of appeal having been given to the party entitled to receive the same though such appeal was not afterwards prosecuted or entered, may (if it think fit) at the sessions for which such notice was given order to the party receiving the same such costs and charges as by the said court shall be thought reasonable and just to be paid by the party giving such notice.

Sessions to  
 have power to  
 give costs in  
 cases of  
 appeal not  
 prosecuted.

*Ib. s. 6.*

148. Where upon the trial of an appeal against any order or judgment made or given by any justice or upon the return to any writ of *certiorari* (a) any objection is made on account of any omission or mistake in the drawing up of such order or judgment, if it be shown to the satisfaction of the court that sufficient grounds were in proof (b) before the justice making such order or giving such judgment to have

Amendment  
 of orders or  
 judgments of  
 justices on  
 appeal or  
 upon return  
 to *certiorari*.  
*Ib. s. 7.*

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§ 149.

Rule for  
*certiorari* to  
state  
objections.

authorised the drawing up thereof free from the said omission or mistake, the court upon such terms as to payment of costs as it thinks fit may amend such order or judgment and may adjudicate thereupon as if no such omission or mistake had existed. Provided that no objection on account of any omission or mistake in any such order or judgment brought up upon a return to a writ of *certiorari* shall be allowed, unless such omission or mistake shall have been specified (c) in the rule for issuing such *certiorari*.

*Certiorari.*

(a) *Certiorari* is not only not taken away, but is contemplated by this statute. *Certiorari* can be taken away only by express words, or by clear enactment, *Symonds v. Dimsdale*, 2 Ex. 533; 17 L.J., Ex. 247; and it may be issued *ex parte*, without any notice to the other side, *ibid.* For a form of notice to justices, of a motion for *certiorari*, see Burns' *Justice* (ed. 1845) 584; (ed. 1869) 665.

*Ex parte.*  
Form of  
notice.

Amendment.

(b) On *certiorari* the Court amended an order, stating that the justices were acting for the locality, by altering "for the borough," to, "in, and for," as there must necessarily have been sufficient evidence before the justices, of the locality in which they were sitting, *R. v. Hellingley*, 1 E. & E. 749; 28 L.J., M.C. 167. What is assumed by all parties at the hearing, is taken to be in proof, within the meaning of this section; and the Court amended by inserting that the place named was within the petty sessional division, *R. v. Higham*, 7 E. & B. 557; 26 L.J., M.C. 116. Where a plaint summons before a warden comprised some matters beyond his jurisdiction, the Court discharged a rule to quash, as the order made did not include these matters, and the summons might be amended, *Reg. v. Smith, ex parte Maloney*, 3 A.J.R. 48.

Defects upon  
the face of  
the order.

(c) *R. v. Sturt, ex parte Lloyd*, 3 A.J.R. 22. The last clause does not apply to defects apparent upon the face of the order, *R. v. Winter*, 4 New Ses. Cas. 116; 14 Q.B. 344; 19 L.J., M.C. 185.

Amendment  
of recog-  
nizances.  
*Ib. s. 8.*

149. Where any recognizance has been entered into within the time by law required before any justice for the purpose of complying with the requirements of any Act giving a right of appeal against orders on summary convictions, if such recognizance appear to any court of general sessions to have been insufficiently entered into or to be otherwise defective or invalid,

such court (if it think fit) may permit the substitution of a new and sufficient recognizance to be entered into before such court in the place of such insufficient defective or invalid recognizance; and for that purpose may allow such time make such examination and impose such terms as to payment of costs to the respondent as it deems reasonable; and such substituted recognizance shall be as valid and effectual as if the same had been duly entered into at any earlier time as required by any Act for that purpose.

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150. (*d*) After the determination (*e*) by a justice of any matter which he has power (*f*) to determine in a summary way by any law now or hereafter to be in force, if any person feel himself aggrieved (*g*) by such determination as being erroneous in point of law, (*h*) he may apply in writing (*i*) within one month (*j*) after the same to the said justice to state and sign a case (*k*) (which may be in the form in the Second Schedule hereto) setting forth the facts and the grounds (*l*) of such determination for the opinion thereon of the Supreme Court, and such party (hereinafter called the "appellant") shall within fourteen (*j*) days after receiving (*m*) such case transmit (*n*) the same to the said court first (*o*) giving notice in writing of such appeal with a copy of the case to the other party (hereinafter called the "respondent").

Appeal to the  
Supreme  
Court in all  
summary  
cases.  
20 & 21 Vict.  
c. 43, s. 2.

Second  
Schedule,  
Form lxvi.

(*d*) Justices ought to facilitate appeals from their decisions; see the charge of Stawell, C.J., in *Hunter v. Sherwin*, *Argus*, 13th March, 1869.

(*e*) The determination contemplated is the ultimate disposition of the case, and not any interlocutory or collateral decision; and an appeal will not lie on the ground of the improper rejection of evidence which would not have turned the decision, *e.g.* evidence in mitigation of damages, *Peachment v. Conlon*, 1 W.W. & A'B., L. 74. A dismissal of the information or complaint is a determination within this section, *Davys v. Douglas*, 4 H. & N. 180; 28 L.J., M.C. 193. The justices must decide the case; if they postpone their

What is a  
determina-  
tion.



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decision pending the appeal, the Court will not entertain the appeal, *Fitzgerald v. Naylor*, Vict. L.T. 149. And they must not find alternatively to meet the view that may be taken either way by the Court, *Potter v. Berry*, 6 W.R. 71. A refusal by justices, on complaint before them, to make an order disallowing an item in the accounts of the surveyor of highways, is a matter for a special case, *Townsend v. Read*, 10 C.B. (N.S.) 308; 30 L.J., M.C. 223. And so is a refusal to compel payment of money by a parish under an order of guardians for contribution, *London Union v. Acocks*, 8 C.B. (N.S.) 760. This would seem to be analogous to the jurisdiction of justices in this colony, to order payment by a local body of the costs of the examination, &c., of a lunatic under the Lunacy Statute, No. 309, Sec. 10; in which matter, also, a special case may be stated, *R. v. Rowe*, 1 V.R., L. 83; 1 A.J.R. 79.

Must be upon  
a point  
within the  
jurisdiction.

(f) This enactment, for the first time, enables the Court to review the decision of justices in cases within their jurisdiction, *Flannagan v. Bishopwearmouth*, 8 E. & B. 455; 27 L.J., M.C. 47. An appeal will not be entertained upon a point not within the jurisdiction of the justices. In an appeal to them as to the amount of a rate, under 15 Vict., No. 18, sec. 31, the justices adjudicated upon the amount (a matter within their jurisdiction), and declined to decide as to rateability (which was not within it); but at the request of the appellant, they stated a case as to rateability. But the Court declined to entertain the case, and gave costs against the appellant, *Blair v. Municipal Council of Ballarat*, 2 W. & W., L. 245. And in a similar case, the Court refused to order the justices to state a case, *exp. May*, 2 B. & S. 426; 31 L.J., M.C. 161. Questions touching the validity of the rate are matters, not for the justices but, for an appeal to the general sessions, whether under the former Local Government and Municipal Acts, No. 176 and No. 184; or the present Shires and Boroughs Statutes, No. 358 and No. 359; and consequently are not matters for a special case. And so under the English Acts, *R. v. Justices of Gloucestershire*, 2 E. & E. 420; 29 L.J., M.C. 117. *Luton Local Board of Health v. Davis*, 2 E. & E. 678; 29 L.J., M.C. 173; 6 Jur. (N.S.) 580. *R. v. Kingston*, E.B. & E. 256; 27 L.J., M.C. 199. The matter for justices, is to issue their warrant for payment of the rate, upon proof of the making of the rate, and the amount at which the defendant has been assessed, if there be no appeal against it. If there be an appeal to them against the rate, they have to determine merely whether the rate was in fact made, and as to the fairness of the amount at which the appellant has been assessed and upon which he is rated, whether absolutely, or as compared with his neighbours. Under the English enactment corresponding to this section (20 & 21 Vict. c. 43, sec. 2), these are not matters for the statement of a special case, as it allows such appeals only from an "information or complaint." See the last three cases, and *Walker v. Gt. Western Ry. Co.*,

Rates.



2 E. & E. 325; 29 L.J., M.C. 107. *Wheeler v. Burmington*, 29 L.J., M.C. 175 (n); 2 L.T. (N.S.) 171. But in this colony, the language of this section being more comprehensive, special cases may be stated by way of appeal from the determination of justices in rating cases, *Mayor of Fitzroy v. Collingwood Gas Co.*, 6 W.W. & A'B., L. 72.

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(g) It is not a valid objection that the special case did not state "Aggrieved," that the appellant felt aggrieved by the determination of the justices, see *Bank of Australasia v. Gartside*, *infra* (q); if he be not in fact aggrieved, the objection must be taken by a motion to strike out the case, *ibid.* Nor does the objection hold against the notice of appeal; it is not to be read too closely, *Henley v. Hart*, 4 W.W. & A'B., L. 162.

(h) It would appear that—as this enactment was intended to enable Ministerial justices, when exercising summary jurisdiction, to obtain advice on acts. points of law—a ministerial act, as merely issuing a warrant of distress to enforce payment of rates, is not a subject for an appeal case, *Sweetman v. Guest*, L.R., 3 Q.B. 262; 37 L.J., M.C. 59; 18 L.T. (N.S.) 53 (n). The question must be one of law. The Court will not entertain an appeal upon any matter of fact, *Newman v. Baker*, 8 C.B. (N.S.) 200; *ex parte Matt*, 1 W. & W., L. 234. In such case the Court dismissed the appeal with costs, *Stubley v. Smith*, *Argus*, March 22, 1865. *Peavor v. Mullen*, *Argus*, Nov. 23, 1866. *Crawley v. Turner*, *Argus*, April 2, 1866.

(i) Though the Court would hesitate very much about issuing a Application *mandamus* to justices to state a case, where the application had not in writing. been in writing, yet it is a matter entirely between the appellant and the justices; and the latter may, if they think fit, state a case upon an oral application, and no objection will afterwards be entertained on that ground, *Lloyd v. Gibb*, 1 A.J.R. 134.

(j) Sunday is to be computed in the time, so that if it end upon a Sunday. Sunday, it is too late to apply on Monday for the statement of a case, *Peacock v. The Queen*, 4 C.B. (N.S.) 264; 27 L.J., C.P. 224. *Wynne v. Ronaldson*, 13 W.R. 899. It is reckoned also in the time for the transmission of the case, *Pennell v. Uxbridge*, 31 L.J., M.C. 92; 8 Jur. (N.S.) 99.

(k) Although entering into a recognisance or making a deposit is Recognisance a condition precedent to the right of appeal, it need not appear upon need not the face of the case, *Wooller v. Carver*, 3 W.W. & A'B., L. 1. In appear on the *O'Dea v. Clayton*, 2 W. & W., L. 252, it appeared upon the case that case. the recognisance was for too small an amount, and the case was struck out upon the hearing.

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All points to  
be stated.

(l) It being the duty of the justices stating the case, to set out *all* the points taken before them, the Court will not assume that any objection taken before them has been omitted, and so will not send back a case for re-statement, without distinct evidence of the omission, *Wilson v. Crawley*, 2 W. & W., L. 78. Where the grounds on which the justices decided, could not be discovered in the case stated, the Court did not send it back, but directed the prothonotary to write certain questions to the clerk of the justices, upon the answers to which the appeal should be decided, *King v. Robinson*, 2 W. & W., L. 5.

Time from  
re-delivery of  
the case.

(m) Where the transmission of the case, though not within fourteen days of the original receipt of the case, was within that time from a date indorsed upon it and initialled by the police magistrate, implying that it had been taken back and re-delivered by the justices, the Court held that it was in time, *Middleton v. Rowe*, 2 A.J.R. 54; *M'Callum v. M'Vean*, 3 A.J.R. 52.

Receipt, as  
well as  
transmission,  
to be in time.

(n) Not only the transmission, but the receipt by the officer of the Court, must be within the time, otherwise the Court has no jurisdiction over the appeal, *Stirling v. Hamilton*, 1 W.W. & A'B., L. 14. *Rapiport v. Raspberry Creek G. M. Co.*, *Argus*, 30th November, 1866. *Williams v. Row*, 1 W. & W., L. 376. And so where a case had been remitted to the justices for re-statement, and not afterwards transmitted in time, the Court set aside a subsequent order of a judge for amendment of the case, as it had altogether lapsed, *Robinson v. Stevenson*, *Argus*, 6th July, 1866. At the request of the appellant's attorney, the clerk of the petty sessions posted the special case in the country, to him in Melbourne; it was held that the clerk was the appellant's agent to *receive* the case, and that the time for transmission ran from the date of his posting, *Ross v. Pyke*, 4 W.W. & A'B., L. 145. It is the duty of the appellant, or his attorney or agent, to obtain the special case from the justices, and not of the latter to send it, *ibid*.

Must first be  
received by  
respondent in  
time.

(o) If notice in writing of the appeal, with a copy of the case, be not *first* given to the respondent, the case will be struck out with costs; it will not do to give them after transmitting the special case, *Kett v. The Queen*, 2 A.J.R. 15. And the notice must be received by, as well as posted to, the respondent within the time, *Ashdown v. Curtis*, 31 L.J., M.C. 216.

Conditions  
precedent.

(p) It has been held that both the notice to the respondent, and the transmission within the prescribed time, were conditions precedent to the jurisdiction of the Court over the appeal, and therefore could not be waived, *Morgan v. Edwards*, 5 H. & N. 415; 29 L.J., M.C. 108. *Woodhouse v. Woods*, 29 L.J., M.C. 149; though where service upon

the respondent within the time was rendered impossible, as by his keeping out of the way, the Court will hold this requirement complied with, if the appellant has made all reasonable efforts to serve him, *ibid.*; and *Syred v. Carruthers*, E.B. & E. 469; 27 L.J., M.C. 273. But as to notice to the respondent and security, it has been held subsequently, in an appeal from a county court under 13 & 14 Vict. c. 61, sec. 14 (substantially the same, as to the precedent notice to the respondent, as this section), that this provision is a matter, not of jurisdiction, but of procedure, entirely for the respondent's benefit; and that he may waive it in a civil matter, though not in a criminal proceeding; and *Peacock v. The Queen*, and *Morgan v. Edwards*, were distinguished on the grounds that in the former, the proceeding was of a criminal nature (being a conviction in a penalty for keeping an ale-house open on Sunday); and that in the latter, the justices were the persons interested in the compliance with these requirements, and that the parties, therefore, could not dispense with them, *Park Gate Iron Company v. Coates*, L.R., 5 C.P. 634; 39 L.J., C.P. 320. The Supreme Court here, however, appears to consider the notice to the respondent a condition precedent to the jurisdiction, as it struck out an appeal where the respondent's attorney, on service upon him of a copy of the case, made no objection that he had not received notice of appeal in writing, *Mallett v. Tuff*, N.C. 63.

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(g) Neglect of any of these preliminary requisites can only be taken advantage of, upon a motion (on affidavits) to strike out the case, as upon the hearing of the appeal the Court will not entertain any objections but such as are stated in, or appear upon the face of, the special case; and it will not entertain objections in the nature of a special demurrer to the form of the case—*e.g.*, that it did not state that the appellant was aggrieved, *Bank of Australasia v. Gartside*, *Argus*, 26th March, 1868. *M'Cormack v. Murray*, 2 W. & W., L. 122. *Wooller v. Carver*, 3 W.W. & A'B., L. 1. *Inskip v. Inskip*, *ibid.* 24 (appeal from Court of Mines). *Cahill v. Keilor Road Board*, *Argus*, 11th December, 1867.

Neglect of  
preliminaries.

151. The appellant at the time (r) of the making such application and before any case is stated as aforesaid shall before some justice enter into a recognizance (s) to Her Majesty in double (t) the amount of the money or penalty (if any) adjudged to be paid, or (if there shall be no such money or penalty or if the same shall be less than the sum next hereinafter mentioned) in the sum of twenty pounds, with or without surety as to such justice shall seem meet, with a condition to

Security and  
notice to be  
given by  
appellant.  
Ib. s. 3.

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§ 152.

prosecute such appeal with effect and without delay and to submit to the judgment of the Supreme Court and pay such costs (*u*) as may be awarded by the same; or shall in lieu of such recognisance deposit in the hands of the clerk of petty sessions the said amount or sum (as the case may be) on the like condition.

When  
recognisance  
to be taken.

(*r*) Though the application be made at the time of the conviction or order, it is sufficient if the recognisance be entered into within the time given for such application, *Chapman v. Robinson*, 1 E. & E. 25; 28 L.J., M.C. 30.

Need not  
appear on the  
case.

(*s*) The existence of the recognisance need not appear upon the case: if there be none, that is an objection to be taken, not at the hearing but, by a motion upon affidavits, to strike out the case, *Wooller v. Carver*, 3 W.W. & A'B., L. 1. But if it appear on the case itself that the recognisance is insufficient, then the Court will deal with it at the hearing, *O'Dea v. Clayton*, 2 W. & W., L. 252. The want of a recognisance is one of those objections which the Court of Common Pleas, in *Park Gate Iron Co. v. Coates*, ante sec. 150 (*p*), considered as not going to the jurisdiction, and therefore capable of being waived; but the Supreme Court here seems to follow the older cases, see *Mallatt v. Tuff*, *ibid.* The loss of the recognisance, it would seem, is not fatal to the appeal, if there be satisfactory evidence that it was actually entered into. So held with regard to appeals to general sessions, see *R. v. Skinner*, *ex parte Hennessy*, ante section 143 (*u*).

Amount of  
recognisance.

(*t*) As to the amount of the recognisance see ante sec. 141 (*s*). An order, at the suit of the official agent of a mining company, was made for £504 10s., the extent of the defendant's liability as a shareholder. The debts of the company at the time were £100, and £30 costs. The Court held that this section applied, uncontrolled by sec. 38 of No. 228, and granted a rule calling upon the justices to state a case, upon deposit, or a recognisance, of twice the amount of the debts of the company, viz., £260, *re Akehurst*, *ex parte Crowley*, *Argus*, 30th November, 1866.

Not for  
justices' costs.

(*u*) The recognisance is not intended to cover the costs of the justices, and the Court has no power to award them, *Luton Local Board of Health v. Davis*, 6 Jur. (N.S.) at p. 582.

Justices may  
refuse  
frivolous  
application

152. If the justice be of opinion that the application is merely frivolous but not otherwise, he may refuse to state a case, and shall on the request of the appel-



lant sign and deliver to him a certificate of such refusal; but the justice shall not refuse to state a case where application for that purpose is made to him by or under the direction of any law officer (*v*).

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unless law  
officer require  
it.  
Ib. s. 4.

(*v*) The latter clause of this section applies only to cases in which the Crown is interested. Justices refused to state a case on the application of the defendant, and the Solicitor-General was induced by the defendant's counsel to apply for and obtain it under this clause. The Crown was not interested in the case, and the Court said that the law officers of the Crown should not interfere in such cases. But the Court did not refuse to entertain the appeal, *Wangaratta Brewery Co. v. Betts*, 1 A.J.R. 79.

Crown not to  
interfere  
when not  
interested.

153. Where the justice refuses to state a case as aforesaid, the appellant may apply to the Supreme Court or any judge (*w*) thereof upon an affidavit of the facts for a rule (*x*) or order calling upon such justice and also upon the respondent to show cause why such case should not be stated; and the said court may make the same absolute (*y*) or discharge it with or without payment of costs as to it seems meet; and the justice upon being served with such rule absolute shall state a case accordingly, upon the appellant entering into such recognizance or depositing such amount as hereinbefore provided.

Where the  
justices  
refuse a case  
the court may  
order one to  
be stated.  
Ib. s. 5.

(*w*) Under the English Act, which gives this power to the Court only, it was said that in vacation, if the period of imprisonment would expire before the Court would sit, a judge might grant a *mandamus* to state a case, and determine it, *re Charles Smith*, 27 L.J., M.C. 188, per Channell, B. But this section expressly gives power to any judge of the Court to make the order.

*Mandamus*  
in vacation.

(*x*) In an application under this section, it is incumbent upon the applicant to show that the decision is erroneous in point of law, *ex parte Matt*, 1 W. & W, L. 234. The Court will not order the justices to state a case where their decision is final—*e.g.*, where they act as referees in disputes of friendly societies under 18 & 19 Vict. c. 63, sec. 40 (corresponding with the Victorian Act, No. 254, sec. 31), *Callaghan v. Dolwin*, 21 L.T. (N.S.) 827. A rule was refused, where the refusal of the justices was on the ground that the justice taking the recog-

Decision must  
be wrong in  
law, and not  
final.



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§ 154.

nisance of the appellant, had made no inquiry whatever into his sufficiency, *re Alley, ex parte Freame, Argus*, 4th July, 1867.

(y) Justices granted a warrant of ejectment in a case which turned on the nature of the tenancy, and whether it had been determined by insolvency, and refused to state a special case. The Court granted an order upon them to state one, *R. v. Panton, ex parte Connor*, 1 A.J.R. 155.

Supreme  
Court to  
decide the  
case.  
Ib. s. 6.

154. The Supreme Court shall hear (b) and determine the question or questions of law (c) arising (d) on the case so transmitted; and shall thereupon reverse affirm or amend (e) the determination in respect of which the case has been stated, or remit the matter to the justice with the opinion of the court thereon; or may make such other order in relation to the matter and as to costs (f) as to the court may seem fit; and all such orders shall be final (g) and conclusive on all parties.

Appearance  
at the hearing  
of the appeal.

(z) Where the appellant had given notice of abandoning the appeal, and did not appear, the respondent was allowed full costs, *Cranbourne Road Board v. Wedge*, 2 W.W. & A'B., L. 87. Where the respondent gave notice that he abandoned the order appealed from, it was held that the appellant was entitled to set down the appeal, to appear, and to have his costs prior to the notice, together with the costs of appearing and of verifying the consent or notice of abandonment, *Henley v. Hart*, 4 W.W. & A'B., L. 162. If the respondent do not appear, the proper course is for the appellant to proceed to show that the decision below is wrong, *Syred v. Carruthers*, E.B. & E. 469; 27 L.J., M.C. 273. Where the respondent appeared, and the appellant did not, the Court, finding the decision appealed from to be wrong, allowed the appeal with costs, *Henty v. Hardwicke, Argus*, July 4th, 1866.

No appear-  
ance by  
justices.

(a) The Court will not allow an appearance on behalf of the justice whose order is appealed from. In refusing an application for that purpose, the Court said there was no precedent for such a course; that nothing could be more injurious to the cause of justice than to allow a magistrate to appear in these cases, *Woodward v. Davey, Argus*, 23rd March, 1868. Nor ought justices to make affidavits in appeals from their orders; they should not interfere on either side after giving their decision, *R. v. Panton, ex parte Connor*, 1 A.J.R. 155. See also *ante* sec. 137 (c).

(b) Where there is a difference between the practice of the Superior Courts at Westminster, the Supreme Court of Victoria follows that of the Court of Queen's Bench, *M'Mullen v. Phillips*, 1 W. & W., L. 15. In the Court of Queen's Bench, upon the hearing of an appeal from justices, the respondent begins in an appeal against a conviction; but where the appellant complains of a dismissal of the summons, he begins, *Jones v. Taylor*, 1 E. & E. 20; 28 L.J., M.C. 204 (n). The Court of Exchequer follows the practice of the Queen's Bench in such cases, *Blackpool Board of Health v. Bennett*, 4 H. & N., 127; 28 L.J., M.C. 204. The Supreme Court has laid down as its rule of practice in such cases, that the party supporting the first proceeding below—information or complainant—should begin, *Gurner v. Municipal Council of St. Kilda*, 2 W. & W., L. 124. *Shaw v. Phillips*, 3 W.W. & A'B., L. 155. And in *Niall v. Page, Argus*, April 6th, 1868 (an appeal from the dismissal of the complaint), the Court said it would not depart from its general practice, that the complainant below should begin.

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§ 154.

Right to  
begin.

(c) Where the case states no question of law for the Court, the appeal is affirmed with costs, *Newman v. Baker*, 8 C.B. (N.S.) 200.

Where no  
question of  
law.

(d) The Court will not give an opinion on a point not submitted to it in the case, *St. James v. St. Mary*, 6 C.B. (N.S.) at p. 893; 29 L.J., M.C. 26. Nor will any objection be entertained, which was not taken below, *Purkis v. Huxtable*, 1 E. & E. 780; 28 L.J., M.C. 221. *S.C. nom. P. v. Constable*, 5 Jur. (N.S.) 790. *R. v. O'Brien*, 3 W.W. & A'B., L. 54. *Motteram v. Eastern Counties R. Co.*, 7 C.B. (N.S.) 58; 29 L.J., M.C. 57; 6 Jur. (N.S.) 583. *Corio Road Board v. Gelletley*, 1 W.W. & A'B., L. 85 (where one of the objections disallowed, had been taken below and then waived). *Hart v. Badham, Argus*, 4th September, 1868. Unless the objection be apparent on the face of the case, *Stinson v. Browning*, 35 L.J., M.C. 152; L.R., 1 C.P. 321. *Winch v. Jennings, Argus*, 3rd September, 1868. Any objections arising out of the preliminary requisites of the appeal, and not appearing upon the face of the case, must be taken upon motion on affidavit to strike out the case, *Bank of Australia v. Gartside, Argus*, 26th March, 1868. If points actually taken below be omitted from the case, that will be ground for remitting the case to the justices for amendment, under sec. 156, *Gutierrez v. Kofoed, Argus*, 27th November and 7th December, 1866.

Argument  
confined to  
points stated.

(e) If the justices have made their order under the wrong section of an Act, the Court has power to amend by drawing it up under the proper one, if the justices had jurisdiction to do it, and the necessary materials were before them, *Shackell v. West*, 2 E. & E. 326; 29 L.J., M.C. 45. But it will not exercise this power, if, by so doing, it would

Amendment.

PART VII.,     deprive the parties of an appeal upon the facts to the general  
§ 155, 156.     sessions; and in such case it remitted the case for a re-hearing, *ibid.*  
 Striking out the name of the Queen, and inserting other complain-  
 ants, is too large an amendment for the Court to make, *R. v. Rowe*,  
 1 V.R., L. 83; 1 A.J.R. 79. See also *ante* sec. 137 (e).

Costs.

(f) This enactment comprises cases in which the Crown is directly or indirectly concerned, and therefore in such cases costs may be awarded, as in others, *Moore v. Smith*, 1 E. & E. 597; 28 L.J., M.C. 126. In the Court of Queen's Bench, in case of a successful appeal, it is not the practice to give costs where the respondent does not appear, *Lee v. Strain*, 28 L.J., M.C. 221. Where the Court dismisses the appeal for want of jurisdiction—as where any of the conditions precedent to the right of appeal have not been complied with, it has no jurisdiction to give costs, *Peacock v. The Queen*, 4 C.B. (N.S.) 264; 27 L.J., C.P. 224. The Court has no power to award to the justices the costs of employing counsel to draw up a special case which it had ordered them to state. The recognisances under sec. 151, do not apply to the costs of justices, *Luton Local Board of Health v. Davis*, 6 Jur. (N.S.) at p. 582.

Appeal to

Privy Council.

(g) Though the policy of the statute appears to be, to give an inexpensive mode of appeal from petty sessions upon points of law, yet the decision of the Supreme Court is not absolutely final. The Supreme Court Act, 15 Vict. No. 10, sec. 33, allows appeals to the Privy Council from “any decree, &c., or order,” and therefore where the case comes within the provisions of that section, there may be an appeal to the Privy Council, *Bendigo Waterworks Co. v. Thunder*, 1 V.R., L. 123; 1 A.J.R. 103.

Costs of

appeal not to  
 exceed £20.

155. No greater sum than twenty pounds shall be allowed as costs to the appellant (if successful) in any appeal to the Supreme Court.

Case may be  
 remitted for  
 amendment.  
 20 & 21 Vict.  
 c. 43, s. 7.

156. (h) The Supreme Court shall have power if it thinks fit (i) to cause the case to be sent back for amendment (j); and thereupon the same shall be amended accordingly; and judgment shall be delivered after it has been amended.

Where case  
 defective.

(h) If the case stated be defective, the proper course is to wait till it comes on for argument, and then if the Court find it so, it will send it back; it will not do so on previous motion, *Christie v. St. Luke's*, 8 E. & B. 992; 27 L.J., M.C. 153; *M'Callum v. M'Vean*, 3 A.J.R.

68; but where a case did not state a compliance with any of the requirements of the statute as to appeal, this was held not to be an objection apparent on the face of the case, and was therefore a subject for an application to strike out the case, and not for a preliminary objection at the hearing, *Woolcott v. Kelly*, 3 A.J.R. 39. But where a material document has been omitted—*semble*, that the Court would send the case back on motion, if there were no dispute on the subject, or if there were an affidavit that the document had been in evidence before the justices, *Yorkshire, &c., Co. v. Rotheram, &c., Board* 4 C.B. (N.S.) 362; 27 L.J., M.C. 235.

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§ 157.

(i) Where the special case is *prima facie* clear and consistent, the Court would require strong grounds for remitting it for restatement, *Webb v. Andrews*, 2 W. & W., L. 128. *Semble*, the Court would not remit the case for amendment by striking out the name of the complainant and inserting others, as that is too large an amendment for the Court itself to make under sec. 137, *R. v. Rowe*, 1 V.R. L. 83; 1 A.J.R. 79. Where points taken below were omitted from the special case, the Court granted a rule for restatement, *Gutierrez v. Kofod, Argus*, Nov. 27th and Dec. 7th, 1866 (it was afterwards discharged, because the appeal turned out not to have been properly launched).

Remitting  
and amending  
special case.

(j) Where the case stated that there was no evidence whether chattels were fixed to the freehold, and it was apparent that there must have been such evidence, or that the fact must have been assumed by all parties, the Court determined to remit the case, not for restatement but, for rehearing, *Clarke v. Tresider, Argus*, April 4th, 1867; not reported on this point in 4 W.W. & A'B., L. 164, as the fact was afterwards admitted. Where the precise grounds on which the justices decided, were not discoverable in the special case, and there were difficulties in sending the case back for restatement, the Court directed the prothonotary to write to the justices' clerk for answers to certain questions, upon which the case would be disposed of, *King v. Robinson*, 2 W. & W., L. 5.

Where  
omission  
apparent on  
the face of  
the case.

Where case  
obscure.

157. After the decision of the Supreme Court in relation to any conviction or order brought before such court by writ of *certiorari* or otherwise or in relation to any rule or order or to any case stated for their opinion under this Act, the justice in relation to whose determination the said writ rule or order has been granted or the case has been stated, or any other justice, may enforce (*k*) any conviction or order which may have been affirmed or amended by the said

After decision  
of court  
justice may  
enforce  
convictions.  
Ib. s. 9.



PART VII.,  
§ 158, 159.

court in the same manner as if the conviction or order so amended had been the conviction or order of such first-mentioned justice.

Renewed  
summons to  
defendant to  
hear the  
amended  
order.

(k) Where an appeal was allowed against a dismissal of an information (under the Scab Act), and the case was returned to the justices to correct their decision, the Court intimated that the defendant could be brought before the justices by a renewed summons to hear the corrected determination, *Curr v. Adams, Argus*, December 21st, 1863.

Justice not  
liable to costs.  
Ib. s. 6.

158. No justice who by virtue of this Act (l) is prohibited from proceeding or from further proceeding as hereinbefore mentioned or from whose determination an appeal is made shall be liable (m) to any costs (n) in respect or by reason of such prohibition or appeal.

(l) Before this enactment, justices were liable to pay costs where a prohibition was granted against their proceedings, *re M'Lachlan, ex parte Francis, Argus*, March 23rd, 1861, where the costs were refused, because at first waived.

No costs to  
justices.

(m) Though the Third Schedule provides fees for the special case, the Court has no power to award to the justices their costs of employing counsel to draw up a special case which the Court had ordered the justices to draw up, *Luton Local Board of Health v. Davis*, 6 Jur. (N.S.) at p. 582.

Costs on  
quashing.

(n) Where the conviction is quashed, costs are given against the party prosecuting, though his appearance is to support the decision of the justices, *Venables v. Hardman*, 1 E. & E. 79; 28 L.J., M.C. 33.

*Certiorari*  
unnecessary.  
Ib. s. 10.

159. No writ of *certiorari* or other writ shall be required for the removal of any order of any court of general sessions of the peace or of any conviction order or other determination (o) in relation to which a case is stated under this Act or otherwise for obtaining the judgment of the Supreme Court on such case under this Act.



(o) This section shows that an order must first be made, before stating a special case, *Clunes United Q. M. Company v. Clunes Borough Council*, 2 W.W. & A'B., L. 96.

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VIII.,  
§ 160-162.

160. The Supreme Court may from time to time and as often as it sees occasion make and alter rules and orders to regulate the practice and proceedings in reference to cases hereinbefore mentioned in which an appeal or application is allowed to the said court.

Court may  
make rules of  
practice.  
Ib. s. 11.

161. Where any person under the provisions of this Act obtains any rule or order calling on any justice to show cause why he should not be prohibited from proceeding or from further proceeding upon or in respect of any conviction or order or appeals to the Supreme Court against any determination of a justice, such person shall be taken to have abandoned finally and conclusively and to all intents and purposes any right which he may have under this or any other Act to appeal to the court of general sessions of the peace.

Application to  
the Supreme  
Court waives  
appeal to  
general  
sessions.  
Ib. s. 14.

## PART VIII.—ACTIONS AGAINST JUSTICES AND OFFICERS.

162. (p) Every action hereafter brought against any justice for any act done by him in the execution of his duty as such justice with respect to any matter within his jurisdiction (q) as such justice shall be an action on the case as for a tort ; and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause ; and if at the trial of any such action upon the general issue being pleaded the plaintiff fail to prove such allegation, he shall be nonsuited or a verdict shall be given for the defendant.

Form of  
action against  
justices and  
allegations  
therein.  
11 & 12 Vict.  
c. 44, s. 1.

(p) A judicial officer is not liable to be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction. A matter of fact so adjudicated by him cannot be put in

Immunity of  
judicial  
persons.

PART VIII.,  
§ 162.

issue in an action against him; the proceedings before him can be proved by the record only, where his court is a court of record, *Kemp v. Neville*, 10 C.B. (N.S.) 523; 31 L.J., C.P. 158; 7 Jur. (N.S.) 913. In *R. v. Young*, 1 Burr., at p. 562, Lord Mansfield declared that though the judgment of justices be wrong, yet the Court would always lean towards favouring them, unless partiality, corruption, or malice clearly appear. Before the protection afforded by this enactment was given, in applications for a criminal information against justices, the question always was, not whether they had acted under mistake or error but, whether they had been actuated by a dishonest, oppressive, or corrupt motive (including fear or favour), *R. v. Borron*, 3 B. & Ald. 432. And see the charge of Stawell, C.J., in *Hunter v. Sherwin*, *Argus*, 13th March, 1869.

Cases within  
this section.

(*q*) In an action against a justice under this section it is not enough to prove that there was no actual ground for imputing to the plaintiff the offence of which he was convicted; it must be shown that *upon the hearing there appeared to be none* upon the evidence then before the justice, *Burley v. Bethune*, 5 Taunt. 583; and herein it differs from an action for malicious prosecution, *ibid.* Even where a justice has in the execution of his office acted maliciously, he is entitled to notice of action under sec. 170. The question of reasonable and probable cause, and of *bona fides*, is for the judge and not for the jury, *Kirby v. Simpson*, 23 L.J., M.C. 165; 10 Ex. 358, where the justices convicted and committed the plaintiff at an irregular hearing for an injury to his own property. The immunity of the justice from an action of trespass, does not depend upon the truth of the alleged facts which are necessary to confer jurisdiction, nor upon the sufficiency of the evidence adduced in support of them, *Cave v. Mountain*, 1 M. & G. 257; 1 Scott, N.R. 132. *Pike v. Carter*, 3 Bing. 78; 10 Moore 376. *Cann v. Clipperton*, 10 A. & E. 582. *Rudd v. Scott*, 2 Scott, N.R. 631. Where justices awarded possession to the landlord, of deserted premises, under 11 Geo. II. c. 19 (corresponding in this respect with the Landlord and Tenant Statute, 1864, No. 192, secs. 88 and 89), and the judge of assize awarded restitution with costs, on the ground that the premises were not deserted—the record of the justices was held a complete defence to an action of trespass, *Ashcroft v. Bourne*, 3 B. & Ad. 684. *Basten v. Carew*, 3 B. & C. 649. A warrant of commitment, not showing jurisdiction, but referring to a good order, is a defence, *Coster v. Wilson*, 3 M. & W. 411. A justice issued a warrant of commitment upon default of payment of an order, which was appealed from and confirmed by the general sessions, subject to a special case. It was held that, in so doing pending the determination of the special case, the justice did not exceed his jurisdiction, and so was within the protection of this section, *Kendall v. Wilkinson*, 4 E. & B. 680; 24 L.J., M.C. 89. Signing a conviction and warrant of commitment, in blank as to the amount of costs

(which was afterwards filled in by the clerk), was held to be merely an irregularity, and not an excess of jurisdiction, and the justices so doing were within this section, *Bott v. Ackroyd*, 28 L.J., M.C. 207. The duty of a justice in admitting to bail is essentially judicial, and is therefore within this section, *Linford v. Fitzroy*, 13 Q.B. 240; 18 L.J., M.C. 108; *semble*, where his duty is purely ministerial, he is not within the protection of this section, *ibid.* A justice has jurisdiction to require sureties for the good behaviour of a person charged before him upon information, with having published a libel calculated to produce a breach of the peace; and in default of sureties to commit him to prison, *Haylock v. Sparke*, 1 E. & B. 471; 22 L.J., M.C. 67. If a warrant be put in by the plaintiff as his evidence, the defendant may use a recital in it of an information on oath, in consequence of which the warrant was granted by him—as evidence of that fact, *ibid.* Justices were held not to be within the protection of this section where they proceeded to order the payment of a church rate and to issue a distress warrant, after having due notice that the validity of the rate was *bonâ fide* disputed, *Pease v. Chaytor*, 1 B. & S. 658; 31 L.J., M.C. 1; and their decision as to *bona fides* must be according to the evidence, and is not conclusive—they cannot give themselves jurisdiction, *R. v. Nunneley*, E.B. & E. 852; 27 L.J., M.C. 260. A commitment for an offence under one statute, cannot be justified by a conviction under another, *Rogers v. Jones*, 3 B. & C. 409; nor is evidence admissible that the plaintiff actually committed the offence stated in the conviction, *ibid.* A justice is liable in trespass for an imprisonment under a bad warrant, though the conviction be good, *Wickes v. Clutterbuck*, 2 Bing. 483. If the recital of a conviction in the warrant, show a want of jurisdiction, the Court will not presume it to be good, *R. v. King*, 13 L.J., M.C. 43.

PART VIII.,  
§ 163.

Cases not  
within this  
section.

163. For any Act done by a justice in a matter of which by law he has not jurisdiction (*r*) or in which he has exceeded his jurisdiction, (*s*) any person injured thereby or by any act done (*t*) under any conviction or order made or warrant issued by such justice in any such matter may maintain an action (*u*) against such justice in the same form and in the same case as he might have done before the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously and without reasonable and probable cause.

Action in  
cases of no or  
exceeded  
jurisdiction.  
11 & 12 Vict.  
c. 44, s. 2.

(*r*) If a justice issue a warrant of arrest based upon a deposition taken, not before himself, and in his presence but, by the clerk, he

Where  
justices liable  
in trespass.

PART VIII.,  
§ 163.

Ministerial  
act.

Distress  
warrant for  
rates.

Act for  
personal  
benefit.

Exceeding  
jurisdiction.

Action  
confined to  
bad part of

acts without jurisdiction, and will be liable to an action of trespass, *Caudle v. Seymour*, 1 Q.B. 889; 10 L.J., M.C. 130; his protection depends on his jurisdiction over, not merely the subject-matter but, the person arrested, *ibid.* And so, if he issue a warrant of arrest under sec. 101, as for not appearing, when there was an appearance by counsel or attorney, *Bessell v. Wilson*, 1 E. & B. 489; 22 L.J., M.C. 94. It would seem that where the duty of the justice is merely ministerial, he is liable within this section, in an action for a mistake in doing, or omitting to do, anything in the execution of that duty, *Linford v. Fitzroy*, 13 Q.B. 240; 18 L.J., M.C. 108. Where the validity of the obligation which justices are asked to enforce is not for them to decide, but is a condition precedent to their having jurisdiction (as in an application for a warrant of distress for rates), if the demand they enforce be bad, they exceed their jurisdiction, and would be within this section, *Newbould v. Coltman*, 6 Ex. 195; 20 L.J., M.C. 149. *Pedley v. Davis*, 10 C.B. (N.S.) 492; 30 L.J., C.P. 374; but in the case of distress warrants for rates, justices are protected by section 167, *post*. A justice committing a defendant to prison for trial, without a written warrant, is liable in trespass, *Hutchinson v. Lowndes*, 4 B. & Ad. 118. And so, if there be no information, *Morgan v. Hughes*, 2 T.R. 225. And so, also, for committing for re-examination for an unreasonable or unauthorised period, *Davis v. Capper*, 10 B. & C. 28. A mayor who was sitting as a justice in the granting of publicans' licenses, exacted a customary fee (which was afterwards decided to be bad) for his own benefit. It was held that he was not entitled to notice of action, as enactments of this kind are intended for the protection of justices accidentally committing an error in the discharge of their official duties, and not where the thing is done for their own personal benefit, *Morgan v. Palmer*, 2 B. & C. 734.

(s) "Exceeding his jurisdiction means assuming to do something which the Act under which he is proceeding could by no possibility justify," *per Jervis, C.J., Ratt v. Parkinson*, 20 L.J., M.C. 212. Justices were held liable, under this section, to an action for exceeding their jurisdiction, where they issued a distress warrant (under which the plaintiff's goods were seized) for costs, there being no adjudication of them in the conviction, *Leary v. Patrick*, 15 Q.B. 266; 19 L.J., M.C. 211; 4 New Ses. Cas. 258. Signing a conviction and warrant of commitment in blank as to the amount of costs (which was afterwards filled in by the clerk) was held to be merely an irregularity, and not an excess of jurisdiction, and the justices so doing were held to be within the preceding section, *Bott v. Ackroyd*, 28 L.J., M.C. 207.

(t) This section and the preceding one must be read together, and this section applies only to cases where the act in respect of which the action is brought, is itself an excess of jurisdiction; and there-



fore where the justice acted within his jurisdiction up to a certain point, viz., ordering the plaintiff to be set in the stocks in default of payment (for which excess of jurisdiction the conviction had been quashed, though this part of the order had not been carried into execution) it was held that an action for seizing goods under a warrant of distress under this conviction, was within the preceding section, *Barton v. Bricknell*, 20 L.J., M.C. 1; 13 Q.B. 393. Where justices wrongly decided that the cause of complaint arose within the time to which their jurisdiction was limited (as in a complaint for the amount of a rate within such time after a *second* demand), it was held that it was their duty to decide this question, and that, as nothing had been done to enforce their order, they were within the protection of the preceding section, *Sommerville v. Mirehouse*, 1 B. & S. 652; but if the order had been enforced by distress or otherwise, *semble, per* Hill, J., they would have been liable to an action under this section, *ibid.*

PART VIII.,  
§ 164.

order, if  
enforced.

(u) In an action for a commitment without jurisdiction, the justice is liable for the usual incidents of the execution of such warrant and imprisonment, but not for any excess, *Mason v. Barker*, 1 Car. & Kir. 100. Justices ought not to take an indemnity, as it has the effect of enabling them to decide more safely in favour of a party who is able to give one, than of one who cannot, *Selwood v. Mount*, 9 C. & P. 75.

Liability for  
usual  
consequences.  
No indemnity  
to be taken.

164. (v) No such action as last aforesaid shall be brought (w) for anything done under such conviction or order until such conviction or order has been quashed (x) either upon appeal to the court of general sessions (y) of the peace or upon application to the Supreme Court; and no such action shall be brought for anything done under any such warrant which has been issued by such justice to procure the appearance of such party and which has been followed by a conviction or order in the same matter, until such conviction or order has been so quashed as aforesaid.

Action not to  
be brought  
until  
conviction or  
warrant  
quashed.  
Ib. s. 2.

(v) Prior to this enactment it was generally necessary to quash the conviction before suing the justice. The record of the justices (while it exists) is conclusive as to what appears upon it, even in their own favour, *Basten v. Carew*, 3 B. & C. 649; *Ashcroft v. Bourne*, ante sec. 162 (q). The conviction of a justice having a competent jurisdiction of the matter, is conclusive till reversed or quashed; and it cannot be set aside at *Nisi Prius*, *Strickland v. Ward*, 12 East. 74

Conviction  
conclusive  
until quashed.



PART VIII., (n), *per* Yates, J. *Fawcett v. Fowler*, 7 B. & C. 394. To justify an  
 § 165. imprisonment there must be a conviction or order. If there be, in

Misrecital. fact, a conviction grounded upon an information on oath which would attach the jurisdiction of the justices, they are protected; and a statement in the warrant of commitment that the information was upon the oath of a person who did not, in fact, swear it, may be rejected as surplusage, *Massey v. Johnson*, 12 East. 67. When there is a conviction, in fact, it is competent for the justices to protect themselves by a conviction drawn up afterwards, *ibid.* If the conviction had been based upon any act or document which was voidable only, but not void until the conviction had been quashed, an alleged avoidance could not be relied upon in an action against the justice, unless it appeared upon the face of the conviction—*e.g.* a conviction of an apprentice under an indenture voidable under 5 Eliz. c. 4, as being for less than seven years, *Gray v. Cookson*, 16 East. 13.

Notice of action before quashing. (v) The conviction or order need not be quashed *before giving notice* of action; the cause of action being complete before the quashing, though the action itself cannot be prosecuted till after it, *Haylock v. Sparke*, 1 E. & B. 471; 22 L.J., M.C. 67.

Where *certiorari* taken away. (x) In the case of a conviction bad for excess of jurisdiction (as for ordering a longer imprisonment under sec. 63 of the Police Offences Statute, 1865, No. 265, than that section authorised), the conviction must be quashed before action, though *certiorari* be taken away by the statute (sec. 66) under which the conviction purported to be; for, so far as a justice exceeds the jurisdiction given him, he does not really act under the statute, *Hunter v. Sherwin*, 6 W.W. & A'B., L. 26. A reversal of a conviction or order upon a case stated by way of appeal, is not equivalent to quashing, *ibid.*

Reversal not equivalent to quashing. (y) Where the justices had jurisdiction, and the conviction was good upon the face upon it, but was quashed by the general sessions on a question of fact, it was held that the justices were not liable in trespass, *Baylis v. Strickland*, 1 Scott N.R. 540; 1 M. & G. 591.

No action to lie if party bringing the same did not appear on summons. *Ib.* s. 2. 165. Where such last-mentioned warrant has not been followed by any such conviction or order or where it is a warrant upon an information for an alleged indictable offence, if a summons (z) was issued previously to such warrant and if such summons was duly served upon such person according to the provisions of this Act and if he did not appear according to the exigency of such summons, no action shall

be maintained against such justice for anything done under such warrant. PART VIII.,  
§ 166, 167.

(z) This does not apply to a summons to the defendant after conviction, to show cause why he should not be committed upon default of payment of a fine, *Bessell v. Wilson*, 1 E. & B. 489; 22 L.J., M.C. 94; but if it did, appearance by counsel or attorney would be sufficient, *ibid.* Summons after conviction.

166. Where a conviction or order has been made by justices and a warrant of distress or of commitment is granted thereon by some other justice *bonâ fide* and without collusion, no action shall be brought against the justice who so granted such warrant by reason of any defect in such conviction or order or for any want of jurisdiction in the justices who made the same; but the action (if any) shall be brought against the justices who made such conviction or order. No action to lie against one justice for warrant issued by him on void order of another.  
Ib. s. 3.

167. When any rate shall be made by the council of the city of Melbourne or town of Geelong or of any shire or borough or by the board of any district and a warrant of distress shall issue against any person named and rated therein no action shall be brought against the justice who shall have granted such warrant by reason of any irregularity or defect in the said rate or by reason of such person not being liable (a) to be rated therein, and in all cases when a discretionary power has been given to a justice by any Act of Parliament, no action shall be brought against such justice for or by reason of the manner in which he shall have exercised his discretion in the execution of any such power. No action to lie for issue of warrants of distress for payment of rates in certain cases.  
Or for discretionary acts.  
Ib. s. 4.

(a) This section will not protect a justice if he act without jurisdiction, as where the person rated had no land within the rating district, *Weaver v. Price*, 3 B. & Ad. 409; approved in *R. v. Justices of Great Yarmouth*, 4 New Ses. Cas. 313. Where no property at all.

PART VIII.,  
§ 168-170.

No action  
where  
proceedings  
confirmed on  
appeal.  
Ib. s. 6.

168. Where a warrant of distress or warrant of commitment is granted by a justice upon any conviction or order which either before or after the granting of such warrant has been or is confirmed (*b*) or amended upon appeal, no action shall be brought against such justice who so granted such warrant for anything which may have been done under the same by reason of any defect in such conviction or order.

As to reversal.

(*b*) It is not to be inferred from this section than an action will lie against a justice when the order or conviction is reversed (not being quashed), *Hunter v. Sherwin*, 6 W.W. & A'B., L. 26.

Proceedings  
in prohibited  
actions to be  
set aside.  
Ib. s. 7.

169. In all cases where by this Act it is enacted that no action shall be brought under particular circumstances, if any such action be brought, any judge of the Court in which such action is brought may, upon application of the defendant and upon an affidavit of facts, set aside the proceedings in such action with or without costs as to the said judge shall seem just.

Limitation  
and notice of  
action.

Ib. ss. 8 and 9.

170. No action (*c*) for anything done by him in the execution of his office (*d*) shall be brought against any justice, unless the same be commenced within six months (*e*) next after the act complained of has been committed; or against any clerk of the peace or other officer of a court of general sessions of the peace, unless the same be commenced within four months next after the act complained of has been committed; and no such action shall be brought against any such justice or officer until one month at least after a notice in writing (*f*) of such intended action has been delivered to him (*g*) or left for him at his usual place of abode by the party intending to commence such action or by his attorney or agent, (*h*) in which notice the cause of action shall be clearly and explicitly stated (*i*) and upon the back thereof shall be endorsed the name and place of abode of the party so intending to sue and also

the name and place of abode or of business of the said attorney or agent if such notice has been served by such attorney or agent.

PART VIII.,  
§ 170.

(c) No notice is necessary before an action against a justice for a penalty for acting without qualification; as the question then is whether he was a justice at all, *Wright v. Horton*, Holt's N.P.C. 458. To be within the protection, the defendant must actually be a justice; *bonâ fide* belief that he was one will not do, *Hughes v. Buckland*, 15 M. & W. at p. 356, *per* Parke, B. Same principle in *Lidster v. Borrow*, 9 A. & E. 654. Such a privilege is not confined to actions of tort; it applies to an action to recover money alleged to have been wrongly levied from the plaintiff; and also where anything is done by the justice *colore officii*, *Waterhouse v. Keen*, 4 B. & C. at p. 210, *per* Bayley, J. The defendants, intending to act within the statute under which they were appointed, made and obtained payment of a rate, as under a repealed Act, and not in accordance with the existing Act; they were held entitled to the benefit of a similar provision in the Act under which they ought to have acted, *Selmes v. Judge*, L.R. 6 Q.B. 724.

Must actually  
be a justice.

Not confined  
to actions of  
tort.

(d) Where the subject-matter was within the jurisdiction of the justice, it will be presumed that he acted as such, though he may have filled another character also, and he is entitled to notice of action, *Briggs v. Evelyn*, 2 H. Bla. 114. This privilege does not apply where the act complained of was done for his personal benefit—*e.g.*, to the exaction of a fee for his own use, under a mistaken belief in an immemorial custom to that effect; it is intended for the protection of justices accidentally committing an error in the discharge of their official duty, *Morgan v. Palmer*, 2 B. & C. 734. A *bonâ fide* belief, with some colour of reason for it, that he was acting within his authority, is sufficient; and these are questions for a jury, *Haseldine v. Grove*, 3 Q.B. 997; 12 L.J., M.C. 10; *Wedge v. Berkeley*, 6 A. & E. 663; *Cook v. Leonard*, 6 B. & C. 351. *Beechy v. Sides*, 9 B. & C. 809. A justice acting in the execution of his office, and within his jurisdiction, is entitled to notice of action, though he acted maliciously and without reasonable and probable cause; and in such case the question of *bonâ fides*, or colourable use of his office, does not arise, *Kirby v. Simpson*, 10 Ex. 358; 23 L.J., M.C. 165. A justice may be entitled to notice of action in respect of one matter, and not for another, *Lamont v. Southall*, 5 M. & W. 416. He acts by virtue of his office, and, consequently, is entitled to notice of action, in cases in which he has authority over the subject-matter, though it arose out of his jurisdiction, *Prestidge v. Woodman*, 1 B. & C. 12. And so where one justice has acted alone, where jurisdiction is given only to two or more, *Weller v. Toke*, 9 East. 364. It is for the judge

Justice  
presumed to  
have acted in  
that capacity.

Act done for  
personal  
benefit.

*Bonâ fide*  
belief.



- PART VIII.,  
§ 170. at the trial to decide whether notice of action is necessary, and for that purpose he should hear evidence on both sides, that he may determine whether the defendant was acting in the execution of his office, *Arnold v. Hamel*, 9 Ex. 404; 23 L.J., Ex. 137. *Stevenson v. Tyler*, 2 W.W. & A'B., L. 179.
- Within six months. (e) It would seem that a justice is liable for such part of an imprisonment under his warrant, as was within six months before the action, *Massey v. Johnson*, 12 East. 75.
- Notice before quashing. (f) The notice of action may be given, in cases not within sec. 162, before the conviction or order is quashed; the cause of action being complete before the quashing, though the action itself cannot be prosecuted until afterwards, *Haylock v. Sparke*, 1 E. & B. 471; 22 L.J., M. C. 67. The notice of action should be in proper form.
- Lawyer's letter. A lawyer's letter from the plaintiff's attorney, stating that he is instructed to take legal proceedings, is not sufficient, *Lewis v. Smith*, Holt's N.P.C. 27.
- Designation of defendant. (g) Where a clerk entitled to notice of action, was clerk to two different bodies, the notice must be addressed to him as clerk to the body whose acts are the subject of the action, *Hyder v. Dorrell*, 1 Taunt. 383.
- (h) A notice of action signed by the plaintiff himself, but indorsed by his attorney, and served by the attorney's clerk, was held sufficient, *Morgan v. Leach*, 10 M. & W. 558; 12 L.J., M.C. 4.
- Need not name all defendants. (i) The notice of action, need not name all the parties to be included in the action, nor express whether the action is to be joint or several. A separate notice to each defendant is sufficient, *Baw v. Jones*, 5 Price 168. *Agar v. Morgan*, 2 Price 126. The notice must state the time and place of the act complained of, *Breche v. Jerdein*, 4 Q.B. 585; 12 L.J., Q.B. 234. It was held bad where it purported to be in trespass, and did not allege malice, and did not show clearly and explicitly whether the action was under the section applicable where there was jurisdiction, or the other, *Taylor v. Nesfield*, 3 E. & B. 724; 23 L.J., M.C. 169. But notices of action are not to be construed as if on special demurrer, *ibid. per Coleridge, J.*; nor with the same strictness as a declaration, *Jones v. Bird*, 5 B. & Ald. 845.
- Must be clear. (j) If a plaintiff apply for a criminal information against a justice, he will be required to abandon any action of which he may have given notice, and which he may have begun, before the Court will entertain the application; notwithstanding the necessity of beginning the action within six months, *R. v. Fielding*, 2 Burr. 719.
- But is not construed strictly.
- Action to be abandoned before criminal information.



171. Every such action against a justice shall be brought in the Supreme Court only; and the venue shall be laid in the circuit district where the act complained of was committed, or (if the act was not committed within any circuit district) in Melbourne; and the defendant shall be allowed to plead the general issue therein, and to give any special matter of defence excuse or justification in evidence under such plea at the trial of such action.

PART VIII.,  
§ 171-173.

Venue and  
pleading.  
11 & 12 Vict.  
c. 44, s. 10.

172. In every such case after notice of action has been given as aforesaid and before such action is commenced the justice to whom such notice is given may tender to the party complaining or to his attorney or agent such sum of money as he may think fit as amends for the injury complained of in such notice; and after such action has been commenced and at any time before issue joined therein such defendant, if he have not made such tender or in addition to such tender, shall be at liberty to pay into court such sum of money as he may think fit; which said tender and payment of money into court or either of them may afterwards be given in evidence by the defendant at the trial under the general issue aforesaid; and if the jury at the trial be of opinion that the plaintiff is not entitled to damages beyond the sum so tendered or paid into court or beyond the sums so tendered and paid into court, they shall give a verdict for the defendant; and the plaintiff shall not be at liberty to elect to be nonsuited; and the sum of money if any so paid into court or so much thereof as shall be sufficient to pay or satisfy the defendant's costs in that behalf shall thereupon be paid out of court to him, and the residue if any shall be paid to the plaintiff.

Tender of  
money or  
payment into  
court.  
Ib. s. 11.

173. Where money is so paid into court in any such action, if the plaintiff elect to accept the same in satis- Plaintiff may obtain money paid into

PART VIII.,  
§ 174, 175.

court and his  
action shall  
cease.

Ib. s. 11.

faction of his damages in the said action, he may obtain from any judge of the Supreme Court an order that such money shall be paid out of court to him and that the defendant shall pay him his costs to be taxed; and thereupon the said action shall be determined, and such order shall be a bar to any other action for the same cause.

What plaintiff  
must prove at  
trial.

Ib. s. 12.

174. If at the trial of any such action the plaintiff do not prove that such action was brought within the time hereinbefore limited in that behalf or that such notice as aforesaid was given one month before such action was commenced, or if he do not prove the cause of action stated in such notice, or if he do not prove that such cause of action arose in the place laid as venue in the margin of the declaration, such plaintiff shall be nonsuit or the jury shall give a verdict for the defendant.

When  
plaintiff is  
entitled to  
merely  
nominal  
damages.  
11 & 12 Vict.  
c. 44, s. 13.

175. Where the plaintiff in any such action is entitled to recover and proves the levying or payment of any penalty or sum of money under any conviction or order as parcel of the damages he seeks to recover or proves that he was imprisoned under such conviction or order and seeks to recover damages for any such imprisonment, he shall not be entitled to recover the amount of such penalty or sums so levied or paid or any sum beyond the sum of twopence as damages for such imprisonment or any costs of suit whatever, if it be proved that he was actually guilty of the offence of which he was so convicted or that he was liable by law to pay the sum he was so ordered to pay and (with respect to such imprisonment) that he had undergone no greater (*l*) punishment than that assigned by law for the offence of which he was so convicted or for non-payment of the sum he was so ordered to pay.

(k) In the latter part of this section, the punishment assigned by law, means the *maximum* that might have been awarded, *Smith v. O'Brien*, 1 W. & W., L. 386. PART VIII.,  
§ 176-178.

176. If the plaintiff in any such action recover a verdict or the defendant allow judgment to pass against him by default, such plaintiff shall be entitled to costs in like manner as if this Act had not been passed; or where in such case it is stated in the declaration that the act complained of was done maliciously and without reasonable and probable cause, if the plaintiff recover a verdict for any damages or if the defendant allow judgment to pass against him by default, the plaintiff shall be entitled to his full costs of suit to be taxed as between attorney and client; and in every action against a justice for anything done by him in the execution of his office, the defendant, if he obtain judgment upon verdict or otherwise, shall in all cases be entitled to his full costs in that behalf to be taxed as between attorney and client. Costs in  
actions  
against  
justices.  
Ib. s. 14.

177. When any such action as aforesaid is brought against any officer of a court of general sessions of the peace, the defendant at any time before plea pleaded may tender or cause to be tendered to the party complaining or his attorney or agent any sum of money as amends for the injury complained of; and if the same be not accepted may pay the sum so tendered or any other sum into court, and may plead the general issue, and may give in evidence the special matter of his defence and also such payment into court. Tender of  
money by  
officer.

178. At the trial of any such action as last aforesaid, the plaintiff shall not be entitled to recover unless it be proved that notice of such action was given in pursuance of this Act; and shall not be permitted to give evidence of any cause of action except such as is contained in such notice; and shall not be entitled to What plaintiff  
must prove at  
trial against  
officer.

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recover if the jury be of opinion that the sum paid into court by the defendant is sufficient amends for the injury of which complaint is made.

Costs in  
actions  
against  
officers.

179. If the plaintiff discontinue any such last-mentioned action, or if upon demurrer or otherwise judgment be given against the plaintiff, or if the plaintiff be nonsuited, or if a verdict pass for the defendant, the defendant shall be entitled to recover his full costs as between attorney and client, and shall have the like remedy for the recovery of the same as any defendant has by law in other cases.

# SCHEDULES.

## FIRST SCHEDULE.

Date of Act.	Title of Act.	Extent of Repeal.
3 Wm. IV. No. 3	<i>" An Act to consolidate and amend " the laws for the transportation " and punishment of offenders in " New South Wales and for defining " the respective powers and autho- " rities of general quarter sessions " and of petty sessions and " for determining the places at " which the same shall be holden " and for better regulating the sum- " mary jurisdiction of justices of " the peace and for repealing cer- " tain laws and ordinances relating " thereto."</i>	Sections 16 and Sec. 2. 17.
2 Vict. No. 11	<i>" An Act to facilitate the apprehen- " sion of offenders escaping from " the island of Van Diemen's Land " or from South Australia to the " colony of New South Wales"</i>	The whole.
6 Vict. No. 7	<i>" An Act to incorporate the inhabi- " tants of the town of Melbourne"</i>	Sections 63-64 and s. 62 except so much thereof as relates to the precedence of the mayor for the time being.



Date of Act.	Title of Act.	Extent of Repeal.
6 Vict. No. 18	<i>"An Act to remove doubts in respect "to the exercise of certain powers "by the councils of the city of "Sydney and town of Melbourne "and to declare the competency of "witnesses and the jurisdiction of "magistrates in certain cases within "the same"</i>	Sections 2 3 4 and so much of section 1 as re- lates to justices of the peace.
7 Vict. No. 17	<i>"An Act to alter and amend the law "respecting the competency of the "jurisdiction of magistrates in cer- "tain cases within the city of Syd- "ney and the town of Melbourne "respectively"</i>	The whole.
7 Vict. No. 25	<i>"An Act to indemnify and render "valid the acts of certain justices "of the peace for the territory of "New South Wales and to enable "territorial justices of the peace to "act as such under certain limita- "tions within the boundaries of the "city of Sydney and town of Mel- "bourne respectively"</i>	The whole.
10 Vict. No. 6	<i>"An Act to extend the provisions of "an Act of Parliament passed in "the seventh year of the reign of "His late Majesty King George the "Fourth as to taking bail in cases "of felony or misdemeanor"</i>	The whole.
11 Vict. No. 41	<i>"An Act to enable the Governor of "the colony to cancel appointments "of places for holding courts of "petty sessions"</i>	The whole.
11 and 12 Vict. cap. 42	<i>"An Act to facilitate the performance "of the duties of justices of the "peace out of sessions within Eng- "land and Wales with respect to "persons charged with indictable "offences"</i>	The whole.

Date of Act.	Title of Act.	Extent of Repeal.
11 and 12 Vict. cap. 43	<i>"An Act to facilitate the performance "of the duties of justices of the "peace out of sessions within Eng- "land and Wales with respect to "summary convictions and orders"</i>	The whole.
11 and 12 Vict. cap. 44	<i>"An Act to protect justices of the "peace from vexatious actions for "acts done by them in execution of "their office"</i>	The whole.
13 Vict. No. 40	<i>"An Act to incorporate the inhabi- "tants of the town of Geelong and "to extend and apply thereto the "laws now in force for the regula- "tion of the Corporation of Mel- "bourne"</i>	So much as extends and applies the provisions of the Act 6 Vict. No. 7 which are re- pealed by this Act.
14 Vict. No. 7	<i>"An Act for the better Apprehen- "sion of Offenders who shall have "escaped to parts within the Ter- "ritory of New South Wales from "any other of the Australian Colo- "nies"</i>	The whole.
14 Vict. No. 45	<i>"An Act to preserve the jurisdiction "and authority of public officers "and magistrates within the colony "of Victoria until new commissions "shall have issued"</i>	The whole.
14 Vict. No. 43	<i>"An Act to adopt and apply certain "Acts of Parliament passed for "facilitating the performance of "the duties of justices of the peace "and for protecting them from "vexatious actions and to prevent "persons convicted of offences from "taking undue advantage of mere "defects or errors in form"</i>	The whole.

Date of Act.	Title of Act.	Extent of Repeal.
14 Vict. No. 12	<i>"An Act to extend to the town of "Geelong and all such other towns "as may from time to time be in- "corporated the provisions of cer- "tain Acts relating to the juris- "diction of the peace within the "respective cities of Sydney and "Melbourne and to certain other "matters therein mentioned"</i>	The whole.
16 Vict. No. 3	<i>"An Act to make provision for the "better administration of justice in "courts of general sessions in the "colony of Victoria"</i>	The whole.
21 Vict. No. 29	<i>"An Act for the more easy recovery "of certain debts and demands"</i>	Section 22 and so much of sections 23 24 25 26 30 34 35 and 37 as relates to pro- ceedings before justices.
22 Vict. No. 76	<i>"An Act to amend the laws relating "to the more easy recovery of cer- "tain debts and demands"</i>	The whole.
24 Vict. No. 122	<i>"An Act to continue an Act intituled "An Act to amend the laws relating "to the more easy recovery of cer- "tain debts and demands"</i>	The whole.
25 Vict. No. 159	<i>"An Act for the better administra- "tion of the law by justices of the "peace and for other purposes in "connection therewith"</i>	The whole except sections 23 and 4
27 Vict. No. 176	<i>"An Act to establish road districts "and shires and generally to pro- "vide for the administration of "local affairs without the limits of "boroughs"</i>	Section 283

Date of Act.	Title of Act.	Extent of Repeal.
27 Vict. No. 178	<i>"An Act to further alter and amend the laws relating to the corpora- tions of the city of Melbourne and the town of Geelong respectively and to extend and apply other existing Acts thereto"</i>	The following words of section 35 (that is to say) "and the mayor elect shall be <i>ex officio</i> a justice of the peace in and for the said city or town as the case may be."
27 Vict. No. 184	<i>"An Act to consolidate and amend the laws relating to municipal institu- tions"</i>	Section 127.

SECOND SCHEDULE.

Section 4.

FORMS UNDER PARTS II. AND III.

FORM I.

COMMITMENT FOR CONTEMPT OF COURT OF GENERAL  
SESSIONS OF THE PEACE.

COURT OF GENERAL SESSIONS }  
To Wit. }

To A.B. and C.D. and their assistants and to the keeper of Section 22.  
the common gaol at

Whereas G.H. late of \_\_\_\_\_ was this  
day duly convicted before me R.W.P. Chairman of the  
Court of General Sessions of the Peace for that he the said  
G.H. on the \_\_\_\_\_ day of \_\_\_\_\_ in the year of our  
Lord 18 \_\_\_\_\_ at \_\_\_\_\_ in the Colony of Victoria  
was guilty of a contempt of the said court and so deemed  
and adjudged by me the said R.W.P. and I the said R.W.P.  
did thereupon adjudge the said G.H. for this his said offence  
to be imprisoned in the common gaol at \_\_\_\_\_ for  
the space of \_\_\_\_\_

## COMMITMENT IN DEFAULT OF FINE FOR CONTEMPT.

These are therefore to command you the said A.B. and C.D. and your assistants to take the said G.H. and him safely to convey to the said common gaol aforesaid and there to deliver him to the said keeper thereof together with the precept and I do hereby command you the said keeper to receive the said G.H. into the said common gaol and there to imprison him for the space of \_\_\_\_\_ and for your so doing this shall be your sufficient warrant.

Given under my hand and the seal of the court this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord 18 \_\_\_\_ .  
R.W.P., Chairman.

## FORM II.

## COMMITMENT IN DEFAULT OF PAYMENT OF FINE FOR CONTEMPT OF COURT OF GENERAL SESSIONS.

COURT OF GENERAL SESSIONS }  
To WIT }

Section 22. To A.B. and C.D. and their assistants and to the keeper of the common gaol at

Whereas G.H. late of [laborer] was this day duly convicted before me R.W.P. Chairman of the Court of General Session of the Peace for that he the said G.H. on the \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord 18 \_\_\_\_ at \_\_\_\_\_ in the Colony of Victoria was guilty of a contempt of the said court and I the said R.W.P. did thereupon adjudge the said G.H. for his said offence to forfeit and pay the sum of £ \_\_\_\_ And whereas the said sum has not been paid these are therefore to command you the said A.B. and C.D. and your assistants to take the said G.H. and him safely to convey to the said common gaol aforesaid and there to deliver him to the said keeper thereof together with this precept. And I do hereby command you the said keeper to receive the said G.H. into the said common gaol and there to imprison him for the space of \_\_\_\_\_ unless the said sum shall be sooner paid and for your so doing this shall be your sufficient warrant.

Given under my hand and the seal of the court this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord 18 \_\_\_\_ .

R. W. P., Chairman.



## FORM III.

## CONVICTION FOR CONTEMPT OF COURT OF PETTY SESSIONS.

VICTORIA }  
To WIT }

Be it remembered That on the \_\_\_\_\_ day of Section 39.  
in the year of our Lord One thousand  
eight hundred and \_\_\_\_\_ at \_\_\_\_\_ in  
the said [colony] A.B. of &c. in the said [colony laborer] is  
convicted before [me or us] the undersigned [one or two] of  
Her Majesty's justices of the peace in and for the said colony  
for that he the said A.B. [*here insert the statement in one of  
the following columns*]

did on the day and year aforesaid at aforesaid	did on the day and year aforesaid at aforesaid	was on the day and year aforesaid at aforesaid
wilfully misbehave himself in a court of petty sessions then and there holden before [me or us]	wilfully interrupt the proceedings of a court of petty ses- sions then and there holden before [me or us]	guilty of wilful pre- varication in giving evidence to a court of petty sessions then and there holden before [me or us]

contrary to the Act in that case made and provided. And  
[I or we] adjudge the said A.B. for &c. [*proceeding as in the  
ordinary form of conviction.*]

## FORM IV.

[*The formal part of the summons will be as in ordinary  
cases and the complaint may be stated therein as follows*]

For that you on the \_\_\_\_\_ day of \_\_\_\_\_ at Section 41.  
in the said \_\_\_\_\_ were indebted to the  
said A.B. in the sum of \_\_\_\_\_

For goods then and there sold and delivered to you by  
the said A.B. and \_\_\_\_\_

For money then and there lent to you by the said A.B.  
and \_\_\_\_\_

For work and labor then and there done by the said A.B.  
for you at your request and \_\_\_\_\_

For the use and hire of divers chattels [*or beasts*] by the  
said A.B. then and there let to hire and delivered to you at  
your request and \_\_\_\_\_

For work and labor then and there done and materials for the same then and there provided by the said A.B. for you at your request and

For the use and occupation of certain land [house or apartments] of the said A.B. by you at your request and by the permission of the said A.B. then and there held and enjoyed and

For board and lodging then and there provided and supplied by the said A.B. for and to you at your request and

For feeding and taking care of horses sheep [or cattle] by the said A.B. then and there fed and taken care of for you at your request and

For warehouse room then and there found and provided by the said A.B. in and about the storing and keeping of goods and chattels by the said A. B. for you at your request and

For the carriage of goods and chattels by the said A.B. then and there carried for you at your request.

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#### FORMS UNDER PART IV.

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##### FORM V.

#### CHARGE FOR AN INDICTABLE OFFENCE.

	To Wit.	}	
Section 52.	The information and complaint of		
	of	in the colony of Victoria	
	taken this	day of	in the year of our Lord
	18	before the undersigned	of Her Majesty's
	justices of the peace in and for the		
	who saith that [ <i>stating the offence</i> ]		
	Sworn before		the day and year
	first above mentioned	at	
	in the said colony.		

J.P.

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##### FORM VI.

#### WARRANT TO APPREHEND.

Sections 52, 59. To constable of in the colony of  
Victoria and to all other peace officers in the  
in the said colony.

\* Charge or Whereas a \* on oath hath this day been  
information. laid before the undersigned of Her Majesty's

justices of the peace in and for the  
for that [*here state shortly the matter of the charges or other  
information*]

These are therefore to command you in Her Majesty's name forthwith to apprehend the said \_\_\_\_\_ and to bring \_\_\_\_\_ before \_\_\_\_\_ or some other of Her Majesty's justices of the peace in and for the \_\_\_\_\_ to answer to the said \* \_\_\_\_\_ and to be further dealt \* Charge or information. with according to law.

Given under                      hand and seal this  
                 day of                      in the  
year of our Lord One thousand eight hundred and  
                 at                      in the colony  
aforesaid.

J.P. (L.S.)

## FORM VII.

## SUMMONS TO THE DEFENDANT.

COLONY OF VICTORIA } To Sections 53, 58.  
To Wit. in the colony of Victoria  
Whereas a \* hath this day been laid before \* Charge,  
the undersigned of Her Majesty's justices of the peace information,  
in and for the for that you [*here state shortly* or complaint.  
*the matter of the charge information or complaint*].

These are therefore to command you in Her Majesty's name to be and appear on the                      day of                      at                      o'clock in the forenoon at                      in the said colony before such justices of the peace as may then be there to answer the said                      and to be further dealt with according to law.

Given under                  hand    and seal    this                  day of  
   in the year of our Lord One thousand  
eight hundred and                  at  
in the colony aforesaid

J.P. (L.S.)

## FORM VIII.

WARRANT TO APPREHEND A PERSON CHARGED WITH AN  
INDICTABLE OFFENCE COMMITTED ON THE HIGH SEAS.

[For offences committed on the high seas the warrant may be the same as in ordinary cases but describing the offence to have been committed "on the high seas and within the jurisdiction of the Admiralty of England."] Section 54.

## CERTIFICATE OF INFORMATION. WARRANT TO ARREST.

*[For offences committed abroad for which the parties may be indicted in this country the warrant also may be the same as in ordinary cases but describing the offence to have been committed "on land out of the colony to wit at \_\_\_\_\_ in the Indian or Pacific Ocean" as the case may be.]*

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 FORM IX.

## CERTIFICATE OF INFORMATION BEING FOUND.

Section 55.

I hereby certify that at [a session of the Supreme Court in its criminal jurisdiction circuit court *or* a court of general sessions of the peace] holden at \_\_\_\_\_ day of \_\_\_\_\_ an information was presented against A.B. therein described as A.B. late of \_\_\_\_\_ in the said colony [laborer] for that he [*dec., stating shortly the offence*] and that the said A.B. hath not appeared or pleaded to the said information.  
 Dated this \_\_\_\_\_ day of \_\_\_\_\_ One thousand eight hundred and \_\_\_\_\_

W.A.M. Associate  
 or \_\_\_\_\_ clerk of the peace at the general sessions of the peace holden at \_\_\_\_\_ in the said colony.

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 FORM X.

## WARRANT TO APPREHEND A PERSON INFORMED AGAINST.

Section 55.

To \_\_\_\_\_ constable of \_\_\_\_\_ in the colony of Victoria and to all other peace officers in the said \_\_\_\_\_

Whereas it hath been duly certified by [associate *or* clerk of the peace at the general sessions of the peace] holden at \_\_\_\_\_

in and for the said colony that [*dec. stating the certificate*] These are therefore to command you in Her Majesty's name forthwith to apprehend the said \_\_\_\_\_ and to bring [him *or* her] before [me *or* us] or some other justices of the peace to be dealt with according to law.

Given under my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord One thousand eight hundred and \_\_\_\_\_ at \_\_\_\_\_ in the colony aforesaid.

J.P. (L.S.)

## FORM XI.

### WARRANT OF COMMITMENT OF A PERSON INFORMED AGAINST.

To                      constable of                      in the colony of Section 56.  
Victoria and to the keeper of the gaol at  
in the said colony.

Whereas by [my or our] warrant under [my or our] hand and seal dated the \_\_\_\_\_ day of \_\_\_\_\_ after reciting that it had been certified by J.D. [*etc. as in the certificate*] [I or we] commanded \_\_\_\_\_ constable of \_\_\_\_\_ in the said colony and all other peace officers of the said colony in Her Majesty's name forthwith to apprehend the said \_\_\_\_\_ and to bring [him or her] before [me or us] the undersigned [one or two] of Her Majesty's justices of the peace \_\_\_\_\_ or before some other justices of the peace \_\_\_\_\_ to be dealt with according to law And whereas the said \_\_\_\_\_ hath been apprehended under and by \_\_\_\_\_ virtue of the said warrant and being now brought before [me or us] it is hereupon duly proved to [me or us] upon oath that the said \_\_\_\_\_ is the same person who is named and charged in and by the said information These are therefore to command you the said constable in Her Majesty's name forthwith to take and safely convey the said \_\_\_\_\_ to the said gaol at \_\_\_\_\_ in the said colony and there to deliver [him or her] to the keeper thereof together with this precept and [I or we] hereby command you the said keeper to receive the said \_\_\_\_\_ into your custody in the said gaol and [him or her] there safely keep until [he or she] shall thence be delivered by due course of law.

Given under [my *or* our] hand and seal this  
day of \_\_\_\_\_ in the year of our Lord One  
thousand eight hundred and \_\_\_\_\_  
at \_\_\_\_\_ in the colony aforesaid.  
J.P. (L.S.)

## FORM XII.

WARRANT TO DETAIN A PERSON INFORMED AGAINST WHO IS  
ALREADY IN CUSTODY FOR ANOTHER OFFENCE.

To the keeper of the gaol at Victoria. in the colony of Section 56.



Whereas it hath been duly certified by [W.A.M. associate or clerk of the peace for the sessions] holden at  
in and for the said colony that [*dec. stating the certificate*].

And whereas [I am or we are] informed that the said A.B. is in your custody in the said gaol at  
in the colony aforesaid charged with some offence or other matter and it being now duly proved upon oath before [me or us] the said A.B. so indicted as aforesaid and the said A.B. in your custody as aforesaid are one and the same person These are therefore to command you in Her Majesty's name to detain the said in your custody in the gaol aforesaid until by Her Majesty's writ of habeas corpus [he or she] shall be removed therefrom for the purpose of being tried upon the same information or until [he or she] shall otherwise be removed or discharged out of your custody by due course of law.

Given under [my or our] hand and seal this  
day of in the year of our Lord One  
thousand eight hundred and at  
in the colony aforesaid.  
J.P. (L.S.)

## FORM XIII.

## ENDORSEMENT IN BACKING A WARRANT.

To Wit. }

Section 63.

Whereas proof upon oath hath this day been made before me one of Her Majesty's justices of the peace for  
of that the name of [J.S.]  
to the within warrant subscribed is of the handwriting of the justice of the peace within mentioned I do therefore hereby authorise [W.S.] who bringeth to me this warrant and all other persons to whom this warrant was originally directed or by whom it may lawfully be executed and also all constables and other peace officers of the said to execute the same within the said last-mentioned and to bring the said A.B. if apprehended within the same before me or before some other justices of the peace of the same to be dealt with according to law.

Given under my hand this day of  
18  
J.P.

## FORM XIV.

## WARRANT WHERE SUMMONS IS DISOBEYED.

COLONY OF VICTORIA } To constable of Section 66.  
 To Wit. } in the colony of Victoria  
 and to all other peace officers  
 in the said

Whereas on the day of a [charge  
 information *or* complaint] was laid before the undersigned  
 of Her Majesty's justices of the peace in and for  
 the said of for that  
 [as in the summons] And whereas then issued  
 summons unto the said

commanding in Her  
 Majesty's name to be and appear on the day of  
 at o'clock in the noon  
 at in the said colony before such  
 justices of the peace as might then be  
 there to answer to the said

and to be further dealt with according to law. And whereas  
 the said hath neglected to be  
 or appear at the time and place so appointed in and by the  
 said summons although it hath now been proved to

upon oath that the said summons was duly served  
 upon the said These are  
 therefore to command you in Her Majesty's name forthwith  
 to apprehend the said  
 and to bring before some other justices of the peace  
 in and before the said to answer to the  
 said and to be further dealt with  
 according to law.

Given under hand and seal this  
 day of in the year of our Lord One  
 thousand eight hundred and at  
 in the colony aforesaid.  
 J.P. (L.S.)

## FORM XV.

## SUMMONS OF A WITNESS.

To of in the Section. 74.  
 colony of Victoria. Whereas a [charge information *or* com-  
 plaint] has been laid before the undersigned  
 of Her Majesty's justices of the peace in and for the  
 for that [as in the summons *or* warrant] and

## WARRANT WHERE WITNESS DISOBEYS SUMMONS.

it has been made to appear to \_\_\_\_\_ upon  
 that you are likely to give material evidence for the  
 [prosecution *or* the prosecutor *or* accused person *or* com-  
 plainant *or* defendant] in this behalf.

These are therefore to require you to be and appear on  
 the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ o'clock in the  
 noon at \_\_\_\_\_ in the said colony before  
 such justices of the peace for the \_\_\_\_\_ as may  
 then be there to testify what you shall know concerning the  
 matter of the said \_\_\_\_\_

Given under \_\_\_\_\_ hand and seal this  
 day of \_\_\_\_\_ in the year of our  
 Lord One thousand eight hundred and \_\_\_\_\_  
 at \_\_\_\_\_ in the colony aforesaid.  
 J.P. (L.S.)

## FORM XVI.

## WARRANT WHERE A WITNESS HAS NOT OBEYED A SUMMONS.

Section 75.

To \_\_\_\_\_ constable of \_\_\_\_\_ in the  
 colony of Victoria and to all other peace officers in the  
 said [colony].

Whereas a [charge information *or* complaint] was laid  
 before the undersigned [one *or* two] of Her Majesty's jus-  
 tices of the peace in and for the said [colony] of  
 for that [*dec. as in the summons or warrant*] and it having  
 been made to appear to [me *or* us] upon oath that E.F. of  
 in the said colony [laborer] was likely to give  
 material evidence for the [prosecution *or* the prosecutor *or*  
 complainant *or* defendant] [I *or* we] did duly issue [my *or*  
 our] summons to the said E.F. requiring [him *or* her] to be  
 and appear on the \_\_\_\_\_ day of \_\_\_\_\_ [instant *or* next] at  
 o'clock in the forenoon of the same day at

in the said colony before such justices of the peace for the  
 said [colony] as might then be there to testify what [he *or*  
 she] should know concerning the said A.B. or the matter of  
 the said [charge information *or* complaint] And whereas proof  
 has this day been made before [me *or* us] upon oath of such  
 summons having been duly served upon the said E.F. [*if a case*  
*of summary jurisdiction*] and of a reasonable sum having been  
 [paid *or* tendered] to [him *or* her] for [his *or* her] costs and  
 expenses in that behalf] And whereas the said E.F. has  
 neglected to appear at the time and place appointed by the  
 said summons and no just excuse hath been offered for such  
 neglect These are therefore to command you to take the  
 said E.F. and to bring and have [him *or* her] on the \_\_\_\_\_ day

of [instant *or* next] at o'clock in the forenoon at  
 in the said colony before me or such other justices of  
 the peace for the said [colony] as may then be there to  
 testify what [he *or* she] shall know concerning the matter of  
 the said [charge information *or* complaint].

Given under [my *or* our] hand and seal this  
 day of in the year of our Lord One thousand  
 eight hundred and at in the  
 colony aforesaid.

J.P. (L.S.)

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FORM XVII.

WARRANT FOR A WITNESS IN THE FIRST INSTANCE.

To constable of in the colony of Section 75.  
 Victoria and to all other peace officers in the said colony.

Whereas a [charge information *or* complaint] has been  
 laid before the undersigned [one *or* two] of Her Majesty's  
 justices of the peace in and for the said [colony] of

that [*as in the summons or warrant*] And whereas it has  
 been made to appear to [me *or* us] upon oath that E.F. of

in the said colony [laborer] is likely to give material  
 evidence for the [prosecution prosecutor complainant *or*  
 defendant] and that it is probable that the said E.F. will  
 not attend to give evidence without being compelled so  
 to do These are therefore to command you to bring and  
 have the said E.F. on the day of

at o'clock in the forenoon at  
 in the said colony before [me *or* us] or such other justices of  
 the peace as may then be there to testify what [he *or* she]  
 shall know concerning the matter of the said [charge infor-  
 mation *or* complaint] so made against the said A.B. as  
 aforesaid.

Given under [my *or* our] hand and seal this  
 day of in the year of our  
 Lord One thousand eight hundred and  
 at in the colony aforesaid.

J.P. (L.S.)

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FORM XVIII.

WARRANT OF COMMITMENT OF A WITNESS FOR REFUSING  
 TO BE SWORN OR TO GIVE EVIDENCE.

To constable of in the Section 76.  
 colony of Victoria and to the keeper of the gaol at  
 in the said colony.

Whereas a [charge information *or* complaint] made before  
 the undersigned [one] of Her Majesty's justices of the peace  
 in and for the for that [*&c. as in the*]

*summons or warrant*] and whereas one E.F. now appearing before [me] and being required to make oath or affirmation as a witness in that behalf has now refused so to do [*or* being now here duly sworn as a witness refuses to answer certain questions concerning the premises which are now here put to him] without offering any just excuse for such [his] refusal These are therefore to command you the said constable to take the said E.F. and [him] safely to convey to the gaol at \_\_\_\_\_ in the colony aforesaid and there deliver [him] to the said keeper thereof together with this precept and [I] do hereby command you the said keeper of the said gaol to receive the said E.F. into your custody in the said gaol and [him] there safely imprison for the space of \_\_\_\_\_ days for [his] said contempt unless [he] shall in the meantime consent to be examined and to answer concerning the premises and for your so doing this shall be your sufficient warrant.

Given under [my] hand and seal this \_\_\_\_\_ day of \_\_\_\_\_  
in the year of our Lord One thousand  
eight hundred and \_\_\_\_\_ at \_\_\_\_\_ in the  
colony aforesaid.

J.P. (L.S.)

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FORM XIX.

POSTPONEMENT OF HEARING.

No.

Section 77.

The summons under the hand of A.B. esquire justice of the peace by which C.D. is required to appear here this day at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon to answer the complaint of E.F. is now postponed by me until [Monday] next the day of \_\_\_\_\_ instant at the same hour and place when and where the said parties and their respective witnesses are required again to appear in order that the said summons may be heard and determined.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_ .  
O.P., Clerk of Petty Sessions.

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FORMS UNDER PART V.

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FORM XX.

DEPOSITIONS OF WITNESSES.

To Wit. }

Section 79.

The examination of C.D. of \_\_\_\_\_ in the colony of  
Victoria [farmer] and E.F. of \_\_\_\_\_ in the said



colony [laborer] taken on [oath] this                      day of  
    in the year of our Lord One thousand eight hundred  
 and                      at                      in the colony aforesaid  
 before the undersigned [one or two] of Her Majesty's justices  
 of the peace for                      in the presence and hearing of  
 A.B. who is charged this day before [me or us] for that [he  
 or she] the said A.B. on the                      day of                      at  
    in the said colony [*&c. describing the offence as in a  
 warrant of commitment*]

This deponent C.D. on [his or her oath] saith as follows—  
 [*stating the deposition of the witness as nearly as possible in  
 the words he uses When his deposition is complete let him  
 sign it.*]

And this deponent E.F. upon [his or her oath] saith as  
 follows—[*&c.*]

The above depositions of C.D. and E.F. were taken and  
 [sworn] before [me or us] at                      in the said colony  
 on the day and year first above mentioned.

J.P.

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### FORM XXI.

#### STATEMENT OF THE ACCUSED.

To Wit. }

A.B. stands charged before the undersigned [one or two] Section 82.  
 of Her Majesty's justices of the peace in and for the  
    this                      day                      in the year of our  
 Lord One thousand eight hundred and                      for  
 that [he or she] the said A.B. on the                      day of  
    at                      in the said colony [*&c. as in the  
 caption of the depositions.*]

And the said charge being read to the said A.B. and the  
 witnesses for the prosecution C.D. and E.F. being severally  
 examined in [his or her] presence the said A.B. is now  
 addressed by [me or us] as follows—"Having heard the  
 evidence do you wish to say anything in answer to the charge  
 You are not obliged to say anything unless you desire to do  
 so you have nothing to hope from any promise of favor and  
 nothing to fear from any threat which may have been held  
 out to you to induce you to make any admission or confes-  
 sion of your guilt but whatever you say will be taken down  
 in writing and may be given in evidence against you upon  
 your trial." Whereupon the said A.B. saith as follows—  
 [*Here state whatever the prisoner may say and in his very  
 words as nearly as possible. Let him sign it if he will.*]

A.B.

## RECOGNIZANCE OF WITNESS. NOTICE THEREOF.

Taken before [me or us] at \_\_\_\_\_ in the said colony  
the day and year first above mentioned.

J.P.

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FORM XXII.

## RECOGNIZANCE TO GIVE EVIDENCE.

Section 84.

Be it remembered That on the \_\_\_\_\_ day of \_\_\_\_\_ in  
the year of our Lord One thousand eight hundred and \_\_\_\_\_  
C.D. \_\_\_\_\_ of \_\_\_\_\_ in the colony of Victoria  
[farmer] or [C.D. of No. 2 \_\_\_\_\_ street in the (city or  
town) of \_\_\_\_\_ in the said colony (surgeon) of which said  
house he is tenant] personally came before [me or us] [one or  
two] of Her Majesty's justices of the peace for \_\_\_\_\_ and  
acknowledged [himself or herself] to owe to our Sovereign  
Lady the Queen the sum of \_\_\_\_\_ of good and lawful  
money of Great Britain to be made and levied of [his or her]  
goods and chattels lands and tenements to the use of our said  
Lady the Queen her heirs and successors if [he or she] the  
said C.D. shall fail in the condition endorsed.

Taken and acknowledged the day and year first above  
mentioned at \_\_\_\_\_ in the said colony before [me or us].

J.P.

The condition of the within-written recognizance is such  
That whereas one A.B. was this day charged before [me or  
us] justices of the peace within mentioned for that [*&c. as in  
the caption of the depositions*] if therefore [he or she] the said  
C.D. shall appear at the next [session of the Supreme Court  
in its criminal jurisdiction or circuit court or at the next  
court of general sessions of the peace] to be holden at  
\_\_\_\_\_ in and for the colony of Victoria on the

\_\_\_\_\_ day of \_\_\_\_\_ and there give such evidence  
as [he or she] knoweth upon an information to be then and  
there preferred against the said A.B. for the offence afore-  
said to the jurors who shall pass upon the trial of the said  
A.B. then the said recognizance to be void or else to stand  
in full force and virtue.

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FORM XXIII.

NOTICE OF THE SAID RECOGNIZANCE TO BE GIVEN TO THE  
WITNESSES.

To Wit. }

Section 84

Take notice That you C.D. of \_\_\_\_\_ in the said  
colony are bound in the sum of \_\_\_\_\_ to appear at the  
next [session of the Supreme Court in its criminal juris-

diction *or* circuit court *or* at the next court of general sessions of the peace] in and for the colony of Victoria to be holden at \_\_\_\_\_ in the said colony on the \_\_\_\_\_ day of \_\_\_\_\_ and then and there give evidence against A.B. and unless you then appear there and give evidence accordingly the recognizance entered into by you will be forthwith levied on you.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 18 .

J.P.

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### FORM XXIV.

#### COMMITMENT OF WITNESS FOR REFUSING TO ENTER INTO THE RECOGNIZANCE.

To \_\_\_\_\_ constable of \_\_\_\_\_ in the colony of Victoria Section 86.  
and to the keeper of the gaol at \_\_\_\_\_ in the said colony.

Whereas A.B. was lately charged before the undersigned [one *or* two] of Her Majesty's justices of the peace in and for the \_\_\_\_\_ of \_\_\_\_\_ for that [*&c. as in the summons to the witness*] \_\_\_\_\_ and it having been made to appear to [me *or* us] upon oath that E.F. of \_\_\_\_\_ in the said colony [laborer] was likely to give material evidence for the prosecution [I *or* we] duly issued [my *or* our] summons to the said E.F. requiring [him *or* her] to be and appear before [me *or* us] on \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ or before such other justice or justices of the peace as should then be there to testify what he should know concerning the said charge so made against the said A.B. as aforesaid and the said E.F. now appearing before [me *or* us] or being brought before [me *or* us] by virtue of a warrant in that behalf] to testify as aforesaid hath been now examined by [me *or* us] touching the premises but being by [me *or* us] required to enter into a recognizance conditioned to give evidence against the said A.B. hath now refused so to do These are therefore to command you the said constable to take the said E.F. and [him *or* her] safely convey to the gaol at \_\_\_\_\_ in the colony aforesaid and there to deliver [him *or* her] to the said keeper thereof together with this precept and [I *or* we] do hereby command you the said keeper of the said gaol to receive the said E.F. into your custody in the said gaol there to imprison and safely keep [him *or* her] until after the trial of the said A.B. for the offence aforesaid unless in the meantime such E.F. shall duly enter into such recognizance as aforesaid in the sum of

## ORDER TO DISCHARGE WITNESS.

pounds before some [one or two] justices of the peace for the said [colony] conditioned in the usual form to appear at the next [session of the Supreme Court in its criminal jurisdiction circuit court or general sessions of the peace] to be holden at \_\_\_\_\_ in and for the colony of Victoria on the \_\_\_\_\_ day of \_\_\_\_\_ and there to give evidence upon any information which may then and there be preferred against the said A.B. for the offence aforesaid and also to give evidence upon the trial of the said \_\_\_\_\_ for the said offence.

Given under my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord One thousand eight hundred and \_\_\_\_\_ at \_\_\_\_\_ in the colony aforesaid.  
J.P. (L.S.)

## FORM XXV.

## SUBSEQUENT ORDER TO DISCHARGE THE WITNESS.

To the keeper of the gaol at \_\_\_\_\_ in the colony of Victoria.

Section 87.

Whereas by [my or our] order dated the \_\_\_\_\_ day of [instant or last past] reciting that A.B. was lately before then charged before [me or us] for a certain offence therein mentioned and that E.F. having appeared before [me or us] and being examined as a witness for the prosecution in that behalf refused to enter into a recognizance to give evidence against the said A.B. and [I or we] therefore thereby committed the said E.F. to your custody and required you safely to keep [him or her] until after the trial of the said A.B. for the offence aforesaid unless in the meantime [he or she] should enter into such recognizance as aforesaid And whereas for want of sufficient evidence against the said A.B. the said A.B. has not been committed or holden to bail for the said offence but on the contrary thereof has been since discharged and it is therefore not necessary that the said E.F. should be detained longer in your custody These are therefore to order and direct you the said keeper to discharge the said E.F. out of your custody as to the said commitment and suffer [him or her] to go at large.

Given under [my or our] hand and seal this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord One thousand eight hundred and \_\_\_\_\_ at \_\_\_\_\_ in the colony aforesaid.

J.P. (L.S.)



FORM XXVI.

WARRANT REMANDING A PRISONER.

To constable of in the colony Section 88.  
of Victoria and to the keeper of gaol at in  
the said colony.

Whereas A.B. was this day charged before the undersigned  
[one or two] of Her Majesty's justices of the peace in and  
for of for that [*etc. as in the*  
*warrant to apprehend*] and it appears to [me or us] to be  
necessary to remand the said A.B. These are therefore to  
command you the said constable in Her Majesty's name  
forthwith to convey the said A.B. to the gaol at  
in the said colony and there to deliver [him or her] to the  
keeper thereof together with this precept and [I or we]  
hereby command you the said keeper to receive the said  
A.B. into your custody in the said gaol and there safely  
keep [him or her] until the day of  
[instant] when [I or we] hereby command you to have [him  
or her] at in the said colony at o'clock  
in the noon of the same day before [me or us] or  
before such other justice or justices of the peace as may then  
be there to answer further to the said charge and to be  
further dealt with according to law unless you shall be  
otherwise ordered in the meantime.

Given under [my or our] hand and seal this  
day of in the year of our Lord One  
thousand eight hundred and at  
in the colony aforesaid.

J.P. (L.S.)

FORM XXVII.

RECOGNIZANCE OF BAIL INSTEAD OF REMAND ON AN  
ADJOURNMENT OF EXAMINATION.

GAOL }  
To WIT }

Be it remembered That on the day of Section 89.  
in the year of our Lord One thousand eight hundred and  
A.B. of in the colony of Victoria  
[laborer] L.M. of in the said colony [grocer] and  
N.O. of in the said colony [butcher] personally  
came before [me or us] [one or two] of Her Majesty's justices  
of the peace for the said [colony] and severally acknowledged  
themselves to owe to our Lady the Queen the several sums  
following that is to say the said A.B. the sum of



## NOTICE OF RECOGNIZANCE TO ACCUSED AND SURETIES.

and the said L.M. and N.O. the sum of  
each of good and lawful money of Great Britain, to be made  
and levied of their several goods and chattels lands and  
tenements respectively to the use of our said Lady the Queen  
her heirs and successors if [he or she] the said A.B. fail in  
the condition endorsed.

Taken and acknowledged the day and year first above  
mentioned at in the said colony before  
[me or us].

J.P.

## CONDITION.

The condition of the within-written recognizance is such  
That whereas the within bounden A.B. was [this day or on  
the day of last past] charged before  
[me or us] for that [*&c. as in the warrant*] And whereas the  
examination of the witnesses for the prosecution in this behalf  
is adjourned until the day of [instant]  
if therefore the said A.B. shall appear before [me or us] on  
the said day of [instant] at  
o'clock in the forenoon or before such other justices of the  
peace for as may then be there to answer  
[further] to the said charge and to be further dealt with  
according to law then the said recognizance to be void or  
else to stand in full force and virtue.

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 FORM XXVIII.
NOTICE OF SUCH RECOGNIZANCE TO BE GIVEN TO THE ACCUSED  
AND HIS SURETIES.

Section 89.

Take notice That you A.B. of in the colony  
of Victoria [laborer] are bound in the sum of  
and your sureties L.M. and N.O. in the sum of  
each that you A.B. appear before [me or us] J.S. [one or  
two] of Her Majesty's justices of the peace for the [colony]  
of on the day of  
[instant] at o'clock in the forenoon at  
in the said colony or before such other justice or justices of  
the peace as may then be there to answer further to the  
charge made against you by C.D. and to be further dealt  
with according to law and unless you A.B. personally appear  
accordingly the recognizance entered into by yourself and  
sureties will be forthwith levied on you and them.

Dated this day of

18 .  
J.P.

FORM XXIX.

RECOGNIZANCE OF BAIL.

To Wit. }

Be it remembered That on the                      day of                      in Section 90.  
the year of our Lord One thousand eight hundred and

A.B. of                      in the colony of Victoria [laborer]  
L.M. of                      in the said colony [grocer] and N.O. of  
in the said colony [*butcher*] personally came before [me *or*  
us] the undersigned [one *or* two] of Her Majesty's justices of  
the peace for

and severally acknowledged themselves to owe to our Lady  
the Queen the several sums following (that is to say) the  
said A.B. the sum of                      and the said L.M. and N.O.  
the sum of                      each of good and lawful money of Great  
Britain to be made and levied of their several goods and  
chattels lands and tenements respectively to the use of our  
said Lady the Queen her heirs and successors if [he] the  
said A.B. fail in the condition endorsed.

Taken and acknowledged the day and year first above  
mentioned at                      in the said colony before [me *or* us].  
J.P.

CONDITION.

The condition of the within-written recognizance is such  
That whereas the said A.B. was this day charged before [me  
*or* us] the justices within-mentioned for that [*dec. as in the*  
*warrant*] if therefore the said A.B. will appear at the next  
[sessions of the Supreme Court in its criminal jurisdiction  
*or* circuit court *or* court of general sessions of the peace]  
to be holden at                      in and for the colony of Victoria  
on the                      day of                      and there surrender [himself] into  
the custody of the keeper of the [common gaol] there and  
plead to such information as may be filed against [him *or* her]  
for and in respect of the charge aforesaid and take [his *or*  
her] trial upon the same and not depart the said court  
without leave then the said recognizance to be void or else  
to stand in full force and virtue.

FORM XXX.

NOTICE OF THE SAID RECOGNIZANCE TO BE GIVEN TO THE  
ACCUSED AND HIS BAIL.

Take notice That you A.B. of                      in the Section 90.  
colony of Victoria [laborer] are bound in the sum of  
and your [sureties L.M. and N.O.] in the sum of

CONSENT TO BAIL. WARRANT OF DELIVERANCE.

each that you A.B. appear [*&c.*, *as in the condition of the recognizance*] and not depart the said court without leave and unless you the said A.B. personally appear and plead and take your trial accordingly the recognizance entered into by you and your sureties shall be forthwith levied on you and them.

Dated this                      day of                      18 .

J.P.

FORM XXXI.

CERTIFICATE OF CONSENT TO BAIL BY THE COMMITTING JUSTICE ENDORSED ON THE COMMITMENT.

Section 91.

[I or we] hereby certify That [I or we] consent to the within-named A.B. being bailed by recognizance himself in and [two] sureties in                      each.

Dated the                      day of                      18 .

J.P.

FORM XXXII.

THE LIKE ON A SEPARATE PAPER.

Section 92.

Whereas A.B. was on the                      day of [now instant or last passed] committed by [me or us] to the gaol at                      in the colony of Victoria charged with [*&c. naming the offence shortly*] [I or we] hereby certify That [I or we] consent to the said A.B. being bailed by recognizance himself in                      and [two] sureties in                      each.

Dated the                      day of                      18 .

J.P.

FORM XXXIII.

WARRANT OF DELIVERANCE ON BAIL BEING GIVEN FOR A PRISONER ALREADY COMMITTED.

Section 95.

To the keeper of the gaol at                      in the colony of Victoria.

Whereas A.B. late of                      in the said colony [laborer] hath before [me one or us two] of Her Majesty's justices of the peace in and for                      entered into his own recognizance and found sufficient sureties for [his or her] appearance at the next [sessions of the Supreme Court in its criminal jurisdiction circuit court or court of general sessions of the peace] to be holden at                      in and for

the said colony of \_\_\_\_\_ to answer our Sovereign Lady the Queen for that [*&c. as in the commitment*] for which [he or she] was taken and committed to your said gaol

These are therefore to command you in Her Majesty's name that if the said A.B. do remain in your custody in the said gaol for the said cause and for no other you shall forthwith suffer [him or her] to go at large.

Given under [my or our] hand and seal this  
day of \_\_\_\_\_ in the year of our Lord One  
thousand eight hundred and \_\_\_\_\_ at  
in the colony aforesaid.

J.P. (L.S.)

## FORM XXXIV.

## WARRANT OF COMMITMENT.

To \_\_\_\_\_ constable of \_\_\_\_\_ and to the keeper of the Section 96.  
gaol at \_\_\_\_\_ in the colony of Victoria.

Whereas A.B. was this day charged before [me or us] J.S. [one or two] of Her Majesty's justices of the peace in and for \_\_\_\_\_ of \_\_\_\_\_ on the oath of C.D. of \_\_\_\_\_ in the said colony [farmer] and others for that [*&c. stating shortly the offence*].

These are therefore to command you the said constable of \_\_\_\_\_ to take the said A.B. and [him or her] safely convey to the gaol at \_\_\_\_\_ aforesaid and there to deliver [him or her] to the keeper thereof together with this precept And [I or we] hereby command you the said keeper of the said gaol to receive the said A.B. into your custody in the said gaol and there safely keep [him or her] until [he or she] shall be thence delivered by due course of law.

Given under [my or our] hand and seal this  
day of \_\_\_\_\_ in the year of our  
Lord One thousand eight hundred and \_\_\_\_\_  
at \_\_\_\_\_ in the colony aforesaid.

J.P. (L.S.)

## FORM XXXV.

## GAOLER'S RECEIPT TO THE CONSTABLE FOR THE PRISONER.

I hereby certify that I have received from W.T. constable Section 97.  
of \_\_\_\_\_ in the colony of Victoria the body of A.B.  
together with a warrant under the hand and seal of J.P.  
[Esquire] [one or two] of Her Majesty's justices of the peace





the time and place to which the said hearing is so adjourned as aforesaid before such justices of the peace as may then be there to answer further to the said [information *or* complaint] and to be further dealt with according to law.

Given under [my *or* our] hand and seal this  
 day of                      in the year of our Lord One  
 thousand eight hundred and  
 at                      in the colony aforesaid.  
    J.P.                      (L.S.)

FORM XXXVIII.

RECOGNIZANCE FOR THE APPEARANCE OF THE DEFENDANT  
 WHERE THE CASE IS ADJOURNED OR NOT AT ONCE PRO-  
 CEDED WITH.

To WIT }

Be it remembered That on the                      day of Section 102.  
    in the year of our Lord One thousand  
 eight hundred and                      A.B. of  
 in the colony of Victoria [laborer] and L.M. of  
 in the said colony [grocer] personally came before the under-  
 signed [one *or* two] of Her Majesty's justices of the peace  
 in and for the said [colony] and severally acknowledged  
 themselves to owe to our Sovereign Lady the Queen the  
 several sums following (that is to say) the said A.B. the  
 sum of                      the said L.M. the sum of  
 of good and lawful money of Great Britain to be made and  
 levied of their several goods and chattels lands and tene-  
 ments respectively to the use of our said Lady the Queen  
 her heirs and successors if [he *or* she] the said A.B. shall  
 fail in the condition endorsed.

Taken and acknowledged the day and year first  
 above mentioned at                      in the said colony  
 before [me *or* us].

J.P.

The condition of the within-written recognizance is such  
 That if the said A.B. shall personally appear on the  
 day of                      [instant *or* next] at                      o'clock  
 in the forenoon at                      in the said colony before  
 such justices of the peace for the said [colony] as may then  
 be there to answer further to the [information *or* complaint]  
 exhibited against the said A.B. and to be further dealt with  
 according to law then the said recognizance to be void or else  
 to stand in full force and virtue.

## CONVICTION, PENALTY, DISTRESS, OR IMPRISONMENT.

## NOTICE OF SUCH RECOGNIZANCE TO BE GIVEN TO THE DEFENDANT AND HIS SURETY.

Take notice That you A.B. of \_\_\_\_\_ in the colony of Victoria [laborer] are bound in the sum of £ \_\_\_\_\_ and you L.M. of \_\_\_\_\_ in the said colony [grocer] in the sum of £ \_\_\_\_\_ that you A.B. appear personally on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ o'clock in the forenoon at \_\_\_\_\_ in the said colony before such justices of the peace for the said [colony] as shall then be there to answer further to a certain [information or complaint] of C.D. the further hearing of which was adjourned to the said time and place and unless you appear accordingly the recognizance entered into by you A.B. and by L.M. as your surety will forthwith be levied on you and him.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ One thousand eight hundred and \_\_\_\_\_

J.P.

And whereas the said A.B. hath been apprehended under and by virtue of a warrant upon such [information or complaint] and is now brought before [me or us] as such justice as aforesaid These are therefore to command you the said constable in Her Majesty's name forthwith to convey the said A.B. to the gaol at \_\_\_\_\_ in the said colony and there to deliver [him or her] to the said keeper thereof together with this precept and [I or we] do hereby command you the said keeper to receive the said A.B. into your custody in the said gaol and there safely keep [him or her] until \_\_\_\_\_ next the \_\_\_\_\_ day of [instant] when you are hereby commanded to convey and have [him or her] at \_\_\_\_\_ in the said colony at \_\_\_\_\_ o'clock in the forenoon of the same day before such justices of the peace as may then be there to answer to the said [information or complaint] and to be further dealt with according to law.

Given under [my or our] hand and seal this \_\_\_\_\_ day \_\_\_\_\_ in the year of our Lord One thousand eight hundred and \_\_\_\_\_ at \_\_\_\_\_ in the colony aforesaid.

J.P. (L.S.)

## FORM XXXIX.

## CONVICTION FOR A PENALTY TO BE LEVIED BY DISTRESS AND IN DEFAULT OF SUFFICIENT DISTRESS IMPRISONMENT.

To Wit }

Section 106.

Be it remembered That on the \_\_\_\_\_ day of \_\_\_\_\_

in the year of our Lord One thousand eight hundred and  
 at in the said [colony] A.B. of  
 in the said [colony laborer] is convicted before the under-  
 signed [one or two] of Her Majesty's justices of the peace  
 for for that he the said A.B. [*&c. stating the  
 offence and the time and place when and where committed*]  
 and [I or we] adjudge the said A.B. for [his or her] said  
 offence to forfeit and pay the sum of [*stating the penalty  
 and also the compensation if any*] to be paid and applied  
 according to law and also to pay to C.D. the sum of  
 for [his or her] costs in that behalf and if  
 the said several sums be not paid forthwith [or on or before  
 next]\* [I or we] order that the same be levied by  
 distress and sale of the goods and chattels of the said A.B.  
 and in default of such sufficient distress\* [*or where the issuing  
 of a distress warrant would be ruinous to the defendant or his  
 family or it appears that he has no goods whereon to levy a  
 distress then instead of the words between the asterisks \*\* say*  
 "then inasmuch as it hath now been made to appear to me  
 that the issuing of a warrant of distress would be ruinous to  
 the said A.B. and his family" or "that the said A.B. has no  
 goods or chattels whereon to levy the said sums by distress"]  
 [I or we] adjudge the said A.B. to be imprisoned in the gaol  
 at in the said colony [there to be kept to hard  
 labor] for the space of unless the said several sums  
 and all costs and charges of the said distress [and of the  
 commitment and conveying of said A.B. to the said gaol]  
 shall be sooner paid.

Given under [my or our] hand and seal the day and  
 year first above mentioned at in the  
 colony aforesaid.

J.P. (L.S.)

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FORM XL.

CONVICTION FOR A PENALTY AND IN DEFAULT OF PAYMENT  
 IMPRISONMENT.

To Wit. }

Be it remembered That on the day of  
 in the year of our Lord One thousand eight hundred and  
 at in the said [colony] A.B. of in  
 the said colony [laborer] is convicted before the undersigned  
 [one or two] of Her Majesty's justices of the peace for  
 for that [he or she] the said A.B. [*&c., stating the offence and  
 the time and place when and where it was committed*] and [I or

Section 106.

## CONVICTION AWARDING IMPRISONMENT ONLY.

we] adjudge the said A.B. for [his or her] said offence to forfeit and pay the sum of [stating the penalty and the compensation if any] to be paid and applied according to law and also to pay to C.D. the sum of for [his or her] costs in this behalf and if the said several sums be not paid [forthwith or on or before the next] [I or we] adjudge the said A.B. to be imprisoned in the gaol at in the said colony [and there to be kept to hard labor] for the space of unless the said several sums and the costs and charges of conveying the said A.B. to the said gaol shall be sooner paid.

Given under [my or our] hand and seal the day and year first above mentioned at in the colony aforesaid.  
J.P. (L.S.)

## FORM XLI.

## CONVICTION WHEN THE PUNISHMENT IS BY IMPRISONMENT, &amp;c.

To Wit. }

Section 106.

Be it remembered That on the day of in the year of our Lord One thousand eight hundred and in the said colony A.B. of in the said colony [laborer] is convicted before the undersigned [one or two] of Her Majesty's justices of the peace for for that [he or she] the said A.B. [stating the offence and the time and place when or where committed] and [I or we] adjudge the said A.B. for [his or her] said offence to be imprisoned in the gaol at in the said colony [and there kept to hard labor] for the space of and [I or we] also adjudge the said A.B. to pay C.D. the sum of for [his or her] costs in this behalf and if the said sum for costs be not paid [forthwith or on or before the next] then\* [I or we] order that the said sum be levied by distress and sale of the goods and chattels of the said A.B. and in default of sufficient distress in that behalf\* [or where the issuing of a distress warrant would be ruinous to the defendant or his family or it appears that he has no goods whereon to levy a distress then instead of the words between the asterisks \*\* say "inasmuch as it hath now been made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A.B. and his family" or "that the said A.B. hath no goods or chattels whereon to levy the said sum for costs by distress"] [I or we] adjudge the said A.B. to be imprisoned in the said gaol [and there kept to hard labor]



for the space of \_\_\_\_\_ to commence at and from the  
 termination of [his or her] imprisonment aforesaid unless the  
 said sum for costs shall be sooner paid.

Given under [my or our] hand and seal the day and  
 year first above mentioned at \_\_\_\_\_ in the  
 aforesaid.

J.P. (L.S.)

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FORM XLII.

ORDER FOR PAYMENT OF MONEY TO BE LEVIED BY DISTRESS  
 AND IN DEFAULT OF DISTRESS IMPRISONMENT.

To Wit. }

Be it remembered That on the \_\_\_\_\_ day of \_\_\_\_\_ in Section 106.  
 the year of our Lord One thousand eight hundred and sixty-  
 complaint was made before the undersigned [one or  
 two] of Her Majesty's justices of the peace in and for  
 of \_\_\_\_\_ for that [*stating the facts entitling the complainant  
 to the order with the time and place when and where they  
 occurred*] and now at this day to wit on the \_\_\_\_\_ day of \_\_\_\_\_  
 in the said colony the parties aforesaid appear before  
 [me or us] the said justice [or the said C.D. appears before  
 [me or us] the said justice but the said A.B. although duly  
 called doth not appear by [himself or herself his or her] counsel  
 or attorney and it is now satisfactorily proved to [me or us]  
 on oath that the said A.B. has been duly served with a sum-  
 mons in this behalf which required [him or her] to be and  
 appear here at this day before such justices of the peace as  
 should now be here to answer to the said complaint and to  
 be further dealt with according to law] and now having  
 heard the matter of the said complaint [I or we] do adjudge  
 the said A.B. to pay to the said C.D. the sum of \_\_\_\_\_  
 forthwith or on or before the \_\_\_\_\_ day of \_\_\_\_\_  
 next [*or as the statute may require*] and also to pay to the said  
 C.D. the sum of \_\_\_\_\_ for [his or her] costs in this behalf  
 and if the said several sums be not paid [forthwith or on or  
 before the \_\_\_\_\_ next]\* [I or we] hereby order that  
 the same be levied by distress and sale of the goods and  
 chattels of the said A.B. and in default of sufficient distress  
 in that behalf\* [*or where the issuing of a distress warrant  
 would be ruinous to the defendant or his family or it appears  
 that he has no goods whereon to levy a distress then instead of the  
 words between the asterisks \*\* say "then inasmuch as it hath  
 now been made to appear to me that the issuing of a war-  
 rant of distress in this behalf would be ruinous to the said*



## ORDER FOR PAYMENT, AND IMPRISONMENT ON DEFAULT.

A.B. and his family" or "that the said A.B. hath no goods or chattels whereon to levy the said sums by distress" [I or we] adjudge the said A.B. to be imprisoned in the gaol at in the said colony [and there kept to hard labor] for the space of unless the said several sums and all costs and charges of the said distress and of the commitment and conveying the said A.B. to the said gaol shall be sooner paid.

Given under [my or our] hand and seal this  
 day of in the year of our Lord One  
 thousand eight hundred and  
 at in the colony aforesaid.  
 J.P. (L.S.)

## FORM XLIII.

ORDER FOR PAYMENT OF MONEY AND IN DEFAULT OF  
PAYMENT IMPRISONMENT.

To Wit. }

Section 106.

Be it remembered That on the day of  
 in the year of our Lord One thousand eight hundred and  
 complaint was made before the undersigned [one  
 or two] of Her Majesty's justices of the peace in and for  
 of for that [stating the facts  
*entitling the complainant to the order with the time and place  
 when and where they occurred*] and now at this day to wit on  
 the day of at in the said  
 colony the parties aforesaid appear before [me or us] the said  
 justice [or the said C.D. appears before [me or us] the said  
 justice but the said A.B. although duly called doth not  
 appear by [himself or herself] or [his or her] counsel or  
 attorney and it is now satisfactorily proved to [me or us] on  
 oath that said A.B. has been duly served with a summons  
 in this behalf which required [him or her] to be and appear  
 here on this day before such justices of the peace for the  
 said colony as should now be here to answer to the said  
 complaint and to be further dealt with according to law] and  
 now having heard the matter of the said complaint [I or we]  
 do adjudge the said A.B. to pay to the said C.D. the sum of  
 forthwith or on or before next [or as  
*the statute may require*] and also to pay to the said C.D. the  
 sum of for [his or her] costs in this behalf and if  
 the said several sums be not paid [forthwith or on or before  
 the day of next] [I or we] adjudge the  
 said A.B. to be imprisoned in the gaol at in  
 the said colony [there to be kept to hard labor] for the

space of                      unless the said several sums and the costs  
and charges of conveying the said A.B. to the said gaol  
shall be sooner paid.

Given under [my *or* our] hand and seal this  
day of                      in the year of our Lord  
One thousand eight hundred and  
at                      in the colony aforesaid.  
J.P.                      (L.S.)

## XLIV.

ORDER FOR ANY OTHER MATTER WHERE THE DISOBEYING  
OF IT IS PUNISHABLE WITH IMPRISONMENT.

To Wit.                      }

Be it remembered That on the                      day of                      Section 106.  
in the year of our Lord One thousand eight hundred and  
complaint was made before the undersigned  
[one *or* two] of Her Majesty's justices of the peace in and  
for                      of                      for that [*stating the facts*  
*entitling the complainant to the order with the time and place*  
*when and where they occurred*] and now at this day to wit on  
at                      in the said colony the parties aforesaid  
appear before [me *or* us] the said justice [*or* the said C.D.  
appears before [me *or* us] the said justices but the said A.B  
although duly called doth not appear by [himself *or* herself]  
or [his *or* her] counsel or attorney and it is now satisfac-  
torily proved to me upon oath that the said A.B. has been  
duly served with the summons in this behalf which required  
[him *or* her] to be and appear here at this day before such  
justices of the peace as should now be here to answer to the  
said complaint and to be further dealt with according to  
law] and now having heard the matter of the said com-  
plaint [I *or* we] do therefore adjudge the said A.B.  
to [*here state the matter required to be done*] and if upon  
a copy of a minute of this order being served upon the said  
A.B. either personally or by leaving the same for [him *or*  
her] at his last or most usual place of abode [he *or* she] shall  
neglect or refuse to obey the same in that case [I *or* we]  
adjudge the said A.B. for such [his *or* her] disobedience to  
be imprisoned in the gaol at                      in the said colony [there to  
be kept to hard labor] for the space of                      [unless the said  
order be sooner obeyed *if the statute authorise this*] and [I *or*  
we] do also adjudge the said A.B. to pay to the said C.D.  
the sum of                      for [his *or* her] costs in this behalf and  
if the said sum for costs be not paid forthwith [*or* on or  
before the                      day of                      next] [I *or* we] order

## DISMISSAL OF INFORMATION OR COMPLAINT.

the same to levied by distress and sale of the goods and chattels of the said A.B. and in default of sufficient distress in that behalf [I or we] adjudge the said A.B. to be imprisoned in the said gaol [and there kept to hard labor] for the space of                      to commence at and from the termination of [his or her] imprisonment aforesaid unless the said sum for costs shall be sooner paid.

Given under [my or our] hand and seal this  
                     day of                      in the year of our Lord One  
                     thousand eight hundred and                      at  
   in the colony aforesaid.  
   J.P.                      (L.S.)

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## FORM XLV.

## ORDER OF DISMISSAL OF AN INFORMATION OR COMPLAINT.

To WIT.                      }

Section 107.

Be it remembered That on the                      day of                      in the year of our Lord One thousand eight hundred and                      [an information or complaint] was laid before the undersigned [one or two] of Her Majesty's justices of the peace in and for                      of                      for that [*dc. as in the summons to the defendant*] and now at this day to wit on the day of                      at                      in the said colony both the said parties appear before [me or us] in order that [I or we] should hear and determine the said information [or complaint] [or the said A.B. appeareth before [me or us] but the said C.D. although duly called doth not appear] whereupon the matter of the said information [or complaint] being by [me or us] duly considered [it manifestly appears to [me or us] that the said information [or complaint] is not proved and\* [*if the informant or complainant do not appear these words may be omitted*] [I or we] do therefore dismiss the same and do adjudge that the said C.D. do pay to the said A.B. the sum of                      for [his or her] costs incurred by [him or her] in [his or her] defence in this behalf and if the said sum for costs be not paid [forthwith or on or before] [I or we] order that the same be levied by distress and sale of the goods and chattels of the said C.D. and in default of sufficient distress in that behalf [I or we] adjudge the said C.D. to be imprisoned in the gaol at                      in the said colony and there kept to hard labor for the space of                      unless the said sum for costs and all costs and charges of the said distress

and of the commitment and conveying of the said C.D. to the said gaol shall be sooner paid.

Given under [my *or* our hand] and seal this  
 day of \_\_\_\_\_ in the year of our Lord One  
 thousand eight hundred and \_\_\_\_\_  
 at \_\_\_\_\_ in the colony aforesaid.  
 J.P. (L.S.)

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FORM XLVI.

CERTIFICATE OF DISMISSAL.

[I *or* we] hereby certify That an information [*or* com- Section 107.  
 plaint] preferred by C.D. of \_\_\_\_\_ in the said colony  
 of Victoria [laborer] against A.B. of \_\_\_\_\_ in the said colony  
 [grocer] for that [*&c. as in the summons*] was this day con-  
 sidered by [me *or* us] [one *or* two] of her Majesty's justices  
 of the peace in and for \_\_\_\_\_ of \_\_\_\_\_ and was by  
 [me *or* us] dismissed [with costs].

Dated this \_\_\_\_\_ day of \_\_\_\_\_ One thousand eight  
 hundred and \_\_\_\_\_

J.P.

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FORM XLVII.

WARRANT OF DISTRESS UPON A CONVICTION FOR A  
 PENALTY.

To \_\_\_\_\_ constable of \_\_\_\_\_ in the colony Section 117.  
 of Victoria and to all other peace officers in the said colony.

Whereas A.B. late of \_\_\_\_\_ in the said colony  
 [laborer] was on this \_\_\_\_\_ day of \_\_\_\_\_ or on the  
 \_\_\_\_\_ day of \_\_\_\_\_ last past duly convicted  
 before the undersigned [one *or* two] of her Majesty's justices  
 of the peace in and for \_\_\_\_\_ of \_\_\_\_\_ for that  
 [*stating the offence as in the conviction*] and it was thereby  
 adjudged that the said A.B. should for such [his *or* her]  
 offence forfeit and pay [*&c. as in the conviction*] and should  
 also pay to the said C.D. the sum of \_\_\_\_\_ for [his *or*  
 her] costs in that behalf and it was thereby ordered that if  
 the said several sums should not be paid forthwith the same  
 should be levied by distress and sale of goods and chattels of  
 the said A.B. and it was thereby also adjudged that in  
 default of sufficient distress the said A.B. should be impris-  
 oned in the gaol at \_\_\_\_\_ in the said colony [and there  
 kept to hard labor] for the space of \_\_\_\_\_ unless the  
 said several sums and all costs and charges of the said dis-

tress and of the commitment and conveying of the said A.B. to the said gaol should be sooner paid.

And whereas the said A.B. being so convicted as aforesaid and being [now] required to pay the said sums of and hath not paid the same or any part thereof but therein hath made default.

These are therefore to command you in Her Majesty's name forthwith to make distress of the goods and chattels of the said A.B. and if within the space of days next after making of such distress the said sums together with reasonable charges of taking and keeping the distress shall not be paid that then you do sell the said goods and chattels so by you distrained and do pay the money arising by such sale unto clerk of the petty sessions at

in the said colony that he may pay and apply the same as by law is directed and may render the overplus (if any) on demand to the said A.B. and if no such distress can be found then that you certify the same unto [me or us] to the end that such further proceedings may be had thereon as to the law doth appertain.

Given under [my or our] hand and seal this  
day of in the year of our Lord One  
thousand eight hundred and at  
in the colony aforesaid.

J.P. (L.S.)

### FORM XLVIII.

#### WARRANT OF DISTRESS UPON AN ORDER FOR PAYMENT OF MONEY.

Section 117. To constable of in the colony of Victoria and to all other peace officers in the said colony.

Whereas on the day of instant [or last past] a complaint was made before the undersigned [one or two] of Her Majesty's justices of the peace in and for of for that [*dec. as in the order*] and afterwards to wit on the day of at in the said colony the said parties appeared before [me or us] [or as in the order] and thereupon having considered the matter of the said complainant [I or we] adjudged the said A.B. [to pay to the said C.D. the sum of on or before the then next] and also to pay to the said C.D. the sum of for [his or her] costs in that behalf and [I or we] thereby ordered that if the said several sums should not be paid on or before the said day of then next the same should



be levied by distress and sale of the goods and chattels of the said A.B. and it was adjudged that in default of sufficient distress in that behalf the said A.B. should be imprisoned in gaol at \_\_\_\_\_ in the said colony and there be kept to hard labor for the space of \_\_\_\_\_ unless the said several sums and all costs and charges of the distress and of the commitment and conveying of the said A.B. to the said gaol should be sooner paid.

And whereas the time in and by the same order appointed for the payment of the said several sums of \_\_\_\_\_ and \_\_\_\_\_ hath elapsed but the said C.D. hath not paid the same or any part thereof but therein hath made default.

These are therefore to command you in Her Majesty's name forthwith to make distress of the goods and chattels of the said A.B. and if within the space of \_\_\_\_\_ days next after making of such distress the last-mentioned sums together with reasonable charges of taking and keeping the said distress shall not be paid that then you do sell the said goods and chattels so by you distrained and do pay the money arising from such sale unto \_\_\_\_\_ the clerk of the petty sessions at \_\_\_\_\_ in the said colony that he may pay and apply the same as by law directed and may render the overplus (if any) on demand to the said A.B. and if no such distress can be found then that you certify the same unto [me or us] to the end that such proceeding may be had therein as to the law doth appertain.

Given under [my or our] hand and seal this  
day of \_\_\_\_\_ in the year of our Lord One  
thousand eight hundred and \_\_\_\_\_ at  
in the colony aforesaid.

J.S. (L.S.)

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FORM XLIX.

ENDORSEMENT IN BACKING A WARRANT OF DISTRESS.

To Wit. }

Whereas proof upon oath hath this day been made before Section 117.  
[me or us] [one or two] of Her Majesty's justices of the  
peace in and for \_\_\_\_\_ of \_\_\_\_\_ that the name of  
J.S. to the within warrant subscribed is of the handwriting  
of the justice of the peace within mentioned [I or we] do  
therefore authorise W.T. who bringeth to [me or us] this  
warrant and all other persons to whom this warrant was  
originally directed or by whom the same may be lawfully  
executed and also all constables and other peace officers of

the said colony of                      to execute the same within the said colony.

Given under my hand this                      day of                      18 .  
J.P.

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FORM L.

CONSTABLE'S RETURN TO A WARRANT OF DISTRESS.

To Wit. }

Section 122.

I. W. T constable of                      in the colony of Victoria do hereby certify to J.S. Esquire [one or two] of Her Majesty's justices of the peace for                      that by virtue of this warrant I have made diligent search for the goods and chattels of the within-mentioned A.B. and that I can find no sufficient goods or chattels of the said A.B. whereon to levy the sums within mentioned.

Witness my hand this                      day of                      18 .  
W.T.

---

FORM LI.

WARRANT OF COMMITMENT FOR WANT OF DISTRESS.

Section 122.

To                      constable of                      in the colony of Victoria and to the keeper of the gaol at                      in the said colony.

Whereas [*&c. as in either of the foregoing distress warrants XLVII. and XLVIII. to the\* and then thus*] And whereas afterwards on the                      day of                      in the year aforesaid [I or we] said justice issued a warrant to the constable of

[in the said colony] commanding him to levy the said sums of                      and                      by distress and sale of the goods and chattels of the said A.B.

And whereas it appears [to me or us] as well by the return of the said constable to the said warrant of distress as otherwise that the said constable hath made diligent search for the goods and chattels of the said A.B. but that no sufficient distress whereon to levy the sums above mentioned could be found These are therefore to command you the said constable of                      in the said colony to take the said A.B. unless the said several sums and all the costs and charges of the said distress and of the commitment and conveying of the said A.B. to the gaol hereinafter next mentioned shall be sooner paid unto you the said constable and [him or her] safely to convey to the gaol at

aforesaid and there deliver [him *or* her] to the said keeper together with this precept and [I *or* we] do hereby command you the said keeper of the said gaol to receive the said A.B. into your custody in the said gaol there to imprison [him *or* her] and keep [him *or* her to hard labor] for the space of \_\_\_\_\_ unless the said several sums and all the costs and charges of the said distress [and of the commitment and conveying the said A.B. to the said gaol] amounting to the further sum of \_\_\_\_\_ shall be sooner paid unto you the said keeper and for your so doing this shall be your sufficient warrant.

Given under [my *or* our] hand and seal this \_\_\_\_\_ day  
of \_\_\_\_\_ in the year of our Lord One thousand  
eight hundred and \_\_\_\_\_ at  
in the colony aforesaid.

J.S. (L.S.)

### FORM LII.

#### WARRANT OF COMMITMENT UPON A CONVICTION FOR A PENALTY IN THE FIRST INSTANCE.

To \_\_\_\_\_ constable of \_\_\_\_\_ in the colony of Victoria Section 124.  
and to the keeper of the gaol at \_\_\_\_\_ in the said colony.

Whereas A.B. late of \_\_\_\_\_ in the colony of Victoria  
[laborer] was on this day duly convicted before the under-  
signed [one *or* two] of Her Majesty's justices of the peace in  
and for \_\_\_\_\_ for that [*stating the offence as in the conviction*]  
and it was thereby adjudged that the said A.B. for  
[his *or* her] said offence should forfeit and pay the sum  
of \_\_\_\_\_ [*dec. as in the conviction*] and should pay to  
the said C.D. the sum of \_\_\_\_\_ for [his *or* her] costs  
in that behalf and it was thereby further adjudged  
that if the said several sums should not be paid forth-  
with the said A.B. should be imprisoned in the gaol  
at \_\_\_\_\_ in the said colony [and there kept to hard  
labor] for the space of \_\_\_\_\_ unless the said several  
sums and the costs and charges of the commitment and convey-  
ing the said A.B. to the said gaol should be sooner paid.

And whereas the time in and by the said conviction  
appointed for the payment of the said several sums hath  
elapsed but the said A.B. hath not paid the same or any part  
thereof but therein hath made default.

These are therefore to command you the said constable  
of \_\_\_\_\_ to take the said A.B. unless the said several  
sums and the costs and charges of commitment and convey-  
ing of the said A.B. to the gaol hereinafter next mentioned

shall be sooner paid unto you the said constable and [him or her] safely to convey to the gaol at aforesaid and there to deliver [him or her] to the keeper thereof together with this precept and [I or we] do hereby command you the said keeper of the said gaol to receive the said A.B. into your custody in the said gaol there to imprison [him or her] and keep [him or her] to hard labor for the space of unless the said several sums and the costs and charges of commitment and conveying [him or her] to the said gaol amounting to the further sum of shall be sooner paid and for your so doing this shall be your sufficient warrant.

Given under [my or our] hand and seal this  
day of in the year of our Lord One  
thousand eight hundred and sixty- at  
in the colony aforesaid.

J.P. (L.S.)

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FORM LIII.

WARRANT OF COMMITMENT UPON AN ORDER IN THE  
FIRST INSTANCE.

Section 124. To constable of and to the  
keeper of the gaol at in the said colony.  
Whereas on the day of [instant or  
last past] complaint was made before the undersigned [one or  
two] of Her Majesty's justices of the peace in and for  
of for that [*&c. as in the order*]  
and afterwards to wit on the day of at  
in the said colony the parties appeared before  
[me or us] the said justice [*or as it may be in the order*] and  
thereupon having considered the matter of the said com-  
plaint [I or we] adjudged the said A.B. to pay to the said  
C.D. the sum of on or before the day of  
then next and also to pay to the said C.D. the  
sum of for [his or her] costs in that behalf and  
[I or we] also thereby adjudged that if the said several sums  
should not be paid on or before the day of  
then next the said A.B. should be imprisoned in the gaol at  
in the said colony and there kept to hard  
labor for the space of unless the said several  
sums and the costs and charges of the commitment and  
conveying the said A.B. to the said gaol should be  
sooner paid.

And whereas the time in and by the said order appointed  
for the payment of the said several sums hath elapsed but

the said A.B. hath not paid the same or any part thereof but therein hath made default.

These are therefore to command you the said constable of                      to take the said A.B. and [him or her] safely to convey to the gaol at                      aforesaid and there to deliver [him or her] to the keeper thereof together with this precept and [I or we] do hereby command you the said keeper of the said gaol to receive the said A.B. into your custody in the said gaol there to imprison [him or her] [and keep him or her to hard labor] for the space of                      unless the said several sums and the costs and charges of the commitment and conveying [him or her] to the said gaol amounting to the further sum of                      shall be sooner paid unto you the said keeper and for your so doing this shall be your sufficient warrant.

Given under [my or our] hand and seal this                      day  
of                      in the year of our Lord One thousand  
eight hundred and sixty-                      at                      in the  
colony aforesaid.

J.P.                      (L.S.)

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FORM LIV.

WARRANT OF COMMITMENT ON A CONVICTION WHERE THE  
PUNISHMENT IS BY IMPRISONMENT.

To                      constable of                      in the colony of Victoria Section 125,  
and to the keeper of the gaol at                      in the said colony.

Whereas A.B. late of                      [laborer] was this day  
duly convicted before the undersigned [one or two] of Her  
Majesty's justices of the peace in and for                      of  
for that [*&c. stating the offence as in the conviction*] and it  
was thereby adjudged that the said A.B. for [his or her]  
said offence should be imprisoned in the gaol at                      in  
the said colony [and there kept to hard labor] for the  
space of

These are therefore to command you the said constable  
of                      to take the said A.B. and [him or her] safely  
convey to the gaol at                      aforesaid and there to deliver  
[him or her] to the keeper thereof together with this precept  
and [I or we] do hereby command you the said keeper of the  
said gaol to receive the said A.B. into your custody in the  
said gaol there to imprison [him or her] and keep [him or  
her to hard labor] for the space of                      and for your so  
doing this shall be your sufficient warrant.



## COMMITMENT FOR DISOBEDIENCE OF ORDER.

Given under [my *or* our] hand and seal this  
 day of \_\_\_\_\_ in the year of our Lord One  
 thousand eight hundred and sixty- \_\_\_\_\_ at  
 in the colony aforesaid.  
 J.P. (L.S.)

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## FORM LV.

WARRANT OF COMMITMENT ON AN ORDER WHERE THE DIS-  
OBEYING OF IT IS PUNISHABLE BY IMPRISONMENT.

Section 125. To \_\_\_\_\_ constable of \_\_\_\_\_ in the colony  
 of Victoria and to the keeper of the gaol at \_\_\_\_\_ in  
 the colony aforesaid.

Whereas on the \_\_\_\_\_ day of \_\_\_\_\_ [instant  
*or* last past] complaint was made before the undersigned  
 [one *or* two] of Her Majesty's justices of the peace in and  
 for the said colony of \_\_\_\_\_ for that [*&c. as in the*  
*order*] and afterwards to wit on the \_\_\_\_\_ at  
 the said parties appeared before [me *or* us] [*or as it*  
*may be in the order*] and thereupon having considered the  
 matter of the said complaint [I *or* we] adjudged the said  
 A.B. to [*&c. as in the order*] and that if upon a copy of the  
 minute of that order being duly served upon the said A.B.  
 either personally or by leaving the same for [him *or* her] at  
 [his *or* her] last or most usual place of abode [he *or* she]  
 should neglect or refuse to obey the same it was adjudged  
 that in such case the said A.B. for such [his *or* her] dis-  
 obedience should be imprisoned in the gaol at  
 in the said colony [and there kept to hard labor] for the  
 space of \_\_\_\_\_ [*unless the said order should be sooner obeyed*]  
 And whereas it is now proved to [me *or* us] that after the  
 making of the said order a copy of the minute thereof was  
 duly served upon the said A.B. but [he *or* she] then [refused *or*  
 neglected] to obey the same and hath not as yet obeyed the  
 said order These are therefore to command you the said  
 constable of \_\_\_\_\_ to take the said A.B. and [him *or*  
 her] safely to convey to the gaol at \_\_\_\_\_ aforesaid and  
 there to deliver [him *or* her] to the keeper thereof together  
 with this precept and [I *or* we] do hereby command you the  
 said keeper of the said gaol to receive the said A.B. into  
 your custody in the said gaol there to imprison [him *or* her]  
 [and keep him *or* her to hard labor] for the space of \_\_\_\_\_  
 and for so doing this shall be your  
 sufficient warrant.

Given under [my *or* our] hand and seal this  
 day of                      in the year of Lord One  
 thousand eight hundred and sixty-  
 at                      in the colony aforesaid.

J.P. (L.S.)

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FORM LVI.

WARRANT OF DISTRESS FOR COSTS UPON A CONVICTION  
 WHERE THE OFFENCE IS PUNISHABLE BY IMPRISONMENT.

To                      constable of                      in the colony Section 126.  
 of Victoria and to all other peace officers in the said colony.

Whereas A.B. of                      in the said colony [laborer]  
 was on                      last past duly convicted before the  
 undersigned [one *or* two] of Her Majesty's justices of the  
 peace in and for                      for that [*stating the offence as*  
*in the conviction*] and it was thereby adjudged that the said  
 A.B. for [his *or* her] said offence should be imprisoned in  
 the gaol at                      in the said colony [and there kept  
 to hard labor] for the space of                      and it was also  
 thereby adjudged that the said A.B. should pay to the  
 said C.D. the sum of                      for [his *or* her] costs in  
 that behalf and it was thereby ordered that if the said sum  
 of                      for costs should not be paid forthwith the  
 same should be levied by distress and sale of the goods and  
 chattels of the said A.B. and it was adjudged that in default  
 of sufficient distress in that behalf the said A.B. should be  
 imprisoned in the said gaol [and there kept to hard labor]  
 for the space of                      to commence at and from the  
 termination of [his *or* her] imprisonment aforesaid unless  
 the said sum for costs and all costs and charges of the said  
 distress and of the commitment and conveying of the said  
 A.B. to the said gaol should be sooner paid And whereas  
 the said A.B. being so convicted as aforesaid and being  
 required to pay the said sum of                      for costs hath  
 not paid the same or any part thereof but therein hath  
 made default These are therefore to command you in Her  
 Majesty's name forthwith to make distress of the goods and  
 chattels of the said A.B. and if within the space of

days next after the making of such distress the said  
 last-mentioned sum together with the reasonable charges of  
 taking and keeping the said distress shall not be paid that  
 then you do sell the said goods and chattels so by you  
 distrained and do pay the money arising from such sale to  
 the clerk of the petty sessions  
 in the said colony that [he *or* they] may pay the same as by

law directed and may render the surplus (if any) on demand to the said A.B. and if no such distress can be found then that you certify the same unto [me or us] to the end that such proceedings may be had therein as to the law doth appertain.

Given under [my or our] hand and seal this  
 day of \_\_\_\_\_ in the year of our Lord One  
 thousand eight hundred and \_\_\_\_\_ at  
 in the colony aforesaid.

J.P. (L.S.)

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FORM LVII.

WARRANT OF DISTRESS FOR COSTS UPON AN ORDER WHERE  
 THE DISOBEYING OF THE ORDER IS PUNISHABLE WITH  
 IMPRISONMENT.

Section 126. To \_\_\_\_\_ constable of \_\_\_\_\_ in the  
 colony of Victoria and to all other peace officers in the said  
 colony.

Whereas on \_\_\_\_\_ [instant or last past] com-  
 plaint was made before the undersigned [one or two] of Her  
 Majesty's justices of the peace in and for  
 of \_\_\_\_\_ for that [etc. as in the order] and  
 afterwards to wit on \_\_\_\_\_ at  
 the said parties appeared before [me or us] as such justice  
 as aforesaid [or as it may be in the order] and thereupon  
 having considered the matter of the said complaint [I  
 or we] adjudged the said A.B. to [etc. as in the order]  
 and that if upon a copy of the minute of that order being  
 served upon the said A.B. either personally or by leaving  
 the same for [him or her] at [his or her] last or most usual  
 abode [he or she] should neglect or refuse to obey the same  
 [I or we] adjudged that in such case the said A.B. for such  
 [his or her] disobedience should be imprisoned in the gaol  
 at \_\_\_\_\_ in the said colony [and there kept to  
 hard labor] for the space of \_\_\_\_\_ [unless the  
 said order should be sooner obeyed] and [I or we] thereby also  
 adjudged the said A.B. to pay to the said C.D. the sum of  
 \_\_\_\_\_ for [his or her] costs in that behalf and [I  
 or we] ordered that if the said sum for costs should not be  
 paid forthwith the same should be levied of the goods and  
 chattels of the said A.B. and it was adjudged that in default  
 of sufficient distress in that behalf the said A.B. should be  
 imprisoned in the said gaol [and there kept to hard labor]  
 for the space of \_\_\_\_\_ to commence at and from  
 the termination of [his or her] imprisonment aforesaid unless

the said sum for costs and all costs and charges of the said distress and of the commitment and conveying of the said A.B. to the said gaol should be sooner paid And whereas the said A.B. being so convicted as aforesaid and being required to pay the said sum of                      for costs hath not paid the same or any part thereof but therein hath made default These are therefore to command you in Her Majesty's name forthwith to make distress of the goods and chattels of the said A.B. and if within the space of                      days next after the making of such distress the said last-mentioned sum together with the reasonable charges of taking and keeping the said distress shall not be paid that then you do sell the said goods and chattels so by you distrained and do pay the money arising from such sale to                      the clerk of the petty sessions at                      in the said colony that he may pay the same as by law directed and may render the overplus [if any] on demand to the said A.B. and if no such distress can be found then that you certify the same unto [me or us] to the end that such proceedings may be had therein as to the law doth appertain.

Given under [my or our] hand and seal this

day of                      in the year of our Lord One thousand eight hundred and                      at  
in the colony aforesaid.

J.P. (L.S.)

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FORM LVIII.

WARRANT OF COMMITMENT FOR WANT OF DISTRESS IN  
EITHER OF THE LAST TWO CASES.

To                      constable of                      in the colony of Section 126.  
Victoria and to the keeper of the gaol in the said colony.

Whereas [*&c. set out the recitals as in the last two forms respectively and then proceed thus*]

And whereas afterwards on the                      day of  
in the year aforesaid [I or we] the said J.S. issued a warrant to the constable of                      in the said colony commanding him to levy the said sum of                      for costs by distress and sale of the goods and chattels of the said A.B. And whereas it appears to [me or us] as well by the return of the said constable to the said warrant of distress as otherwise that the said constable hath made diligent search for the goods and chattels of the said A.B. but that no sufficient distress whereon to levy the sum above mentioned could be found These are therefore to command you

the said constable of \_\_\_\_\_ to take the  
 said A.B. and [him or her] safely to convey to the gaol at  
 \_\_\_\_\_ aforesaid and there deliver [him or her] to the  
 keeper thereof together with this precept and [I or we] do  
 hereby command you the said keeper of the said gaol to  
 receive the said A.B. into your custody in the said gaol  
 there to imprison [him or her] and keep [him or her] to  
 hard labor for the space of \_\_\_\_\_ unless the said  
 sum and all costs and charges of the said distress and of the  
 commitment and conveying of the said A.B. to the said gaol  
 amounting to the further sum of \_\_\_\_\_ shall be  
 sooner paid unto you the said keeper and for your so doing  
 this shall be your sufficient warrant.

Given under [my or our] hand and seal this  
 day of \_\_\_\_\_ in the year of our Lord  
 One thousand eight hundred and \_\_\_\_\_ at  
 in the colony aforesaid.

J.P. (L.S.)

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### FORM LIX.

#### WARRANT OF DISTRESS FOR COSTS UPON AN ORDER FOR DISMISSAL OF AN INFORMATION OR COMPLAINT.

Section 128.

To \_\_\_\_\_ constable of \_\_\_\_\_ in the colony  
 of Victoria and to all other peace officers in the said colony.  
 Whereas on \_\_\_\_\_ [instant or last past] [in-  
 formation or complaint] was laid before the undersigned [one  
 or two] of Her Majesty's justices of the peace in and for the  
 said colony for that [*&c. as in order of dismissal*] and after-  
 wards to wit on \_\_\_\_\_ at \_\_\_\_\_ in the  
 said colony both parties appearing before [me or us] in order  
 that [I or we] should hear and determine the same and the  
 several proofs adduced to [me or us] in that behalf being by  
 [me or us] duly heard and considered and it manifestly  
 appearing to [me or us] that the said [information or com-  
 plaint] was not proved [I or we] therefore dismissed the  
 same and adjudged that the said C.D. should pay to the said  
 A.B. the sum of \_\_\_\_\_ for [his or her] costs incurred  
 by [him or her] in [his or her] defence in that behalf and [I  
 or we] ordered that if the said sum for costs should not be  
 paid [forthwith] the same should be levied of the goods and  
 chattels of the said C.D. and [I or we] adjudged that in  
 default of sufficient distress in that behalf the said C.D.  
 should be imprisoned in the gaol at \_\_\_\_\_ in the said  
 colony [and there kept to hard labor] for the space of \_\_\_\_\_  
 unless the said sum for costs and all costs and charges



of the said distress and of the commitment and conveying of the said C.D. to the said gaol should be sooner paid And whereas the said C.D. being now required to pay unto the said A.B. the said sum for costs hath not paid the same or any part thereof but therein hath made default (\*) These are therefore to command you in Her Majesty's name forthwith to make distress of the goods and chattels of the said C.D. and if within the space of                      days next after the making of such distress the said last-mentioned sum together with the reasonable charges of taking and keeping the said distress shall not be paid that then you do sell the said goods and chattels so by you distrained and do pay the money arising from such sale to                      the clerk of the petty sessions at                      in the said colony that he may pay and apply the same as by law directed and may render the overplus [if any] on demand to the said                      and if no such distress can be found then that you certify the same unto [me or us] to the end that such proceedings may be had therein as to the law doth appertain.

Given under [my or our] hand and seal this  
                     day of                      in the year of our Lord One  
                     thousand eight hundred and                      at  
                     in the colony aforesaid.

J.P.                      (L.s.)

FORM LX.

WARRANT OF COMMITMENT FOR WANT OF DISTRESS IN THE  
 LAST CASE.

To                      constable of                      in the colony Section 128.  
 of Victoria and to the keeper of the gaol at                      in  
 the said colony.

Whereas [*dc. as in the last form to the asterisk\* and then thus*] And whereas afterwards on the                      day of  
                     in the year aforesaid [I or we] the said  
 justice issued a warrant to the constable of  
 commanding him to levy the said sum of                      for  
 costs by distress and sale of the goods and chattels of the  
 said C.D. And whereas it appears to [me or us] as well by  
 the return of the said constable to the said warrant of dis-  
 tress as otherwise that the said constable hath made diligent  
 search for the goods and chattels of the said C.D. but that  
 no sufficient distress whereon to levy the sum above men-  
 tioned could be found. These are therefore to command  
 you the said constable of                      to take the said C.D. and

## CERTIFICATE THAT COSTS OF APPEAL ARE UNPAID.

[him *or* her] safely convey to the gaol at \_\_\_\_\_ afore-  
said and there deliver [him *or* her] to the said keeper thereof  
together with this precept and [I *or* we] do hereby command  
you the said keeper of the said gaol to receive the said C.D.  
into your custody in the said gaol there to imprison [him *or*  
her and keep him *or* her to hard labor] for the space of \_\_\_\_\_

unless the said sum and all costs and charges of the  
said distress and of the commitment and conveying of the  
said C.D. to the said gaol amounting to the further sum of \_\_\_\_\_  
shall be sooner paid unto you the said keeper  
and for your so doing this shall be your sufficient warrant.

Given under [my *or* our] hand and seal this  
day of \_\_\_\_\_ in the year of our Lord One  
thousand eight hundred and \_\_\_\_\_ at  
in the colony aforesaid. J.P. (L.s.)

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 FORM LXI.

 Section 131. CERTIFICATE OF CLERK OF THE PEACE THAT THE COSTS OF  
AN APPEAL ARE NOT PAID.

Office of the clerk of the peace for

[*Title of the Appeal*]

I hereby certify that at a court of general sessions of the  
peace holden at \_\_\_\_\_ on the \_\_\_\_\_ day of  
\_\_\_\_\_ [instant *or* last past] an appeal by A.B.  
against a [conviction *or* order] of J.S. [one *or* two] of Her  
Majesty's justices of the peace for \_\_\_\_\_ came on to  
be tried and was then heard and determined and the said  
court of general sessions thereupon ordered that the said  
[conviction *or* order] should be [confirmed *or* quashed] and  
that the said [appellant] should pay to the said [respondent]  
the sum of \_\_\_\_\_ for [his *or* her] costs incurred by  
[him *or* her] in the said appeal and which sum was thereby  
ordered to be paid to the clerk of the peace at  
in the said colony on or before the \_\_\_\_\_ day of  
[instant *or* next] to be by him handed over to the said  
[respondent] and I further certify that the said sum for costs  
has not nor has any part thereof been paid in obedience to  
the said order.

Dated the

day of

18

S.J.S.

Clerk of the Peace.

## FORM LXII.

WARRANT OF DISTRESS FOR COSTS OF AN APPEAL AGAINST A  
CONVICTION OR ORDER.

To \_\_\_\_\_ constable of \_\_\_\_\_ in the Section 131.  
colony of Victoria and to all other peace officers in the said  
colony.

Whereas [*&c. as in warrant of distress XLVII. and  
XLVIII. to the end of the statement of the conviction or order  
and then thus*] And whereas the said A.B. appealed to the  
court of general sessions of the peace holden at  
against the said [*conviction or order*] in which appeal the  
said A.B. was the appellant and the said C.D. [*or*] J.S.  
Esquire the justice of the peace who made the said [*convic-  
tion or order*] was the respondent and which said appeal  
came on to be tried and was heard and determined at the  
last general sessions of the peace holden at \_\_\_\_\_ on the  
day of \_\_\_\_\_ [*instant or last past*]

and the said court of general sessions thereupon ordered that  
the said [*conviction or order*] should be [*confirmed or  
quashed*] and that the said [*appellant*] should pay to the  
said [*respondent*] the sum of \_\_\_\_\_ [*his*] costs incurred  
by [*him or her*] in the said appeal which sum was to be  
paid to the clerk of the peace for \_\_\_\_\_ on or before the  
day of \_\_\_\_\_ 18 \_\_\_\_\_ to be by him handed

over to the said C.D. And whereas the said clerk of the  
peace for \_\_\_\_\_ hath on the \_\_\_\_\_ day of \_\_\_\_\_

[*instant or last past*] duly certified that the said sum for  
costs had not then been paid \* These are therefore to com-  
mand you in Her Majesty's name forthwith to make distress  
of the goods and chattels of the said A.B. and if within the  
space of \_\_\_\_\_ days next after the making of such

distress the said last-mentioned sum together with the  
reasonable charges of taking and keeping the said distress  
shall not be paid that then you do sell the said goods and  
chattels so by you distrained and do pay the money arising  
from such sale to \_\_\_\_\_ the clerk of the petty sessions

at \_\_\_\_\_ in the said colony that he may pay and apply  
the same as by law directed and if no such distress can be  
found then that you certify the same unto [*me or us*] to the  
end that such proceedings may be had therein as to the law  
doth appertain.

Given under [*my or our*] hand and seal this  
day of \_\_\_\_\_ in the year of our Lord One  
thousand eight hundred and \_\_\_\_\_  
at \_\_\_\_\_ in the colony aforesaid.

J.P. (L.S.)

## FORM LXIII.

WARRANT OF COMMITMENT FOR WANT OF DISTRESS IN  
THE LAST CASE.

Section 131. To constable of in the colony  
of Victoria and to the keeper of the gaol at in  
the said colony.

Whereas [*&c. as in the last form to the asterisk \* and then thus*]

And whereas afterwards on the day of  
in the year aforesaid [*I or we*] the undersigned issued a  
warrant to the constable of commanding him  
or levy the said sum of for costs by distress and  
sale of the goods and chattels of the said A.B. And  
whereas it appears to [*me or us*] as well by the return of the  
said constable to the said warrant of distress as otherwise that  
the said constable hath made diligent search for the goods  
and chattels of the said A.B. but that no sufficient distress  
whereon to levy the sum above mentioned could be found  
These are therefore to command you the said constable of  
to take the said A.B. and [*him or her*] safely  
to convey to the gaol at aforesaid and there  
deliver [*him or her*] to the said keeper thereof together with  
this precept and [*I or we*] do hereby command you the said  
keeper of the said gaol to receive the said A.B. into your  
custody in the said gaol there to imprison [*him or her* and  
keep him *or her* to hard labor] for the space of  
unless the said sum and all costs and charges of the said  
distress and of the commitment and conveyance of the said  
A.B. to the said gaol amounting to the further sum of  
shall be sooner paid unto you the said keeper and for your  
so doing this shall be your sufficient warrant.

Given under [*my or our*] hand and seal this  
day of in the year of our Lord One  
thousand eight hundred and at  
in the colony aforesaid.

J.N. (L.S.)

## FORM LXIV.

## SUMMONS IN CASE OF ADVERSE CLAIMS TO GOODS DISTRAINED.

VICTORIA }  
To Wit. }

Section 121. To A.B. of &c. and C.D. of &c.

Whereas complaint hath this day been made before the  
undersigned [*one or two*] of Her Majesty's justices of the

peace in and for \_\_\_\_\_ for that by a warrant under the  
hand and seal of [one] of Her Majesty's justices of the peace  
in and for \_\_\_\_\_ dated the \_\_\_\_\_ day of \_\_\_\_\_ last  
and directed to &c. the said constables were commanded in  
Her Majesty's name forthwith to make distress of the goods  
and chattels of E.F. and that G.H. one of the said constables  
had under the said warrant distrained certain goods and  
chattels as and for the goods and chattels of the said E.F.\*  
and that you the said C.D. have claimed the same as your  
property. These are therefore to command you the said  
A.B. and C.D. in Her Majesty's name to be and appear on  
the \_\_\_\_\_ day of \_\_\_\_\_ [next or instant] at  
o'clock in the \_\_\_\_\_ noon at \_\_\_\_\_ in the said [colony]  
before such justices of the peace as may be then there in  
order that they may adjudicate upon the said claim and  
make an order thereupon according to law.

Given under my hand &c.

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### FORM LXV.

#### ORDER IN CASE OF ADVERSE CLAIMS TO GOODS DISTRAINED.

VICTORIA }  
To WIT. }

Be it remembered That on the \_\_\_\_\_ day of \_\_\_\_\_ Section 121.

complaint was made [*as in the summons to the\**] and  
that C.D. had claimed the same as his property and now at  
this day A.B. the party who obtained the said warrant and  
the said C.D. appear before us the undersigned [two] of Her  
Majesty's justices of the peace in and for the said [colony]  
(*if both do not appear state the non-appearance and service of  
the summons* "to be and appear here at this day before" &c.  
"in order that they might adjudicate upon the said claim and  
make an order thereupon according to law") and now having  
heard the matter of the said complaint we do adjudge that  
(*here state the adjudication in one of the following forms*)—

the said goods and chattels were [not] at the time of the said distress thereof the prop- erty of the said C.D.	part of the said goods and chattels to wit one chair &c. were at the time of the said distress thereof the property of the said C.D. but that the residue of the said goods and chattels was not his property.
--	--

And we do also adjudge the said [C.D. or A.B.] to pay to



the said [A.B. or C.D.] forthwith [or on or before the  
day of                      next] the sum of                      for his costs  
in this behalf and if the said sum (*proceed as in the usual*  
"order" *mutatis mutandis*).

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## FORM LXVI.

## IN THE SUPREME COURT.

Section 150.

In the matter of an appeal from the determination of  
the undersigned [*two*] of Her Majesty's justices of  
the peace in and for                      in a proceeding  
before us at B. in                      between  
A.B. Complainant [*or* Prosecutor]  
and  
C.D. Defendant.

The [*information or if a civil case say* complaint] alleged  
that &c. [*here state the charge or claim*] The defendant pleaded  
not guilty and after hearing the parties and the evidence  
adduced by them we did on the                      day of  
18                      convict the defendant of the said offence and adjudged  
him to pay the sum of                      for the same (*or in a civil*  
*case say* make an order against the defendant for the pay-  
ment by him to the complainant of the sum of  
*or* dismiss the said [*information or complaint*]).

The [*defendant or complainant*] alleging that he was  
aggrieved by the said determination as being erroneous in  
point of law did within one month thereafter apply in  
writing to us to state and sign a case setting forth the facts  
and the grounds of such determination for the opinion  
thereon of this honorable court and did at the time of  
making such application and before the stating of this case  
before a justice of the peace enter into a recognizance to  
Her Majesty in the sum of

with a condition to prosecute this appeal with effect  
and without delay and to submit to the judgment of this  
honorable court and pay such costs as may be awarded by  
the same and thereupon in pursuance of the Act in such case  
made and provided we state and sign the following case.

It was proved [*or* admitted *as the case may be*] upon the  
hearing that &c. [*here state the facts*].

We determine that the matter hereinbefore stated afforded  
no ground of answer or defence to the said\*  
*or* was sufficient to support the said \*

The question for the opinion of the court is whether our  
said determination was erroneous in point of law.

## FORM LXVII.

To WIT. } To the constable of

Whereas it appears to me the undersigned one of Her Majesty's justices of the peace in and for the said by the information on oath of E.F.

in the aforesaid that the following goods to wit [*here describe them*] of him the said E.F. were within the last [*week*] feloniously stolen taken and carried away from the [*dwelling-house*] of the said E.F. at and that the said E.F. hath reasonable cause to suspect and doth suspect that the said goods or part thereof are concealed in the [*dwelling-house*] of C.D. [*laborer*] at these are therefore in the name of our Lady the Queen to authorise and require you with necessary and proper assistants to enter in the daytime into the said [*dwelling-house*] of C.D. at aforesaid and therein diligently search for the said goods and if the same or any part thereof shall be found upon such search that you bring the goods so found as also the body of the said C.D. before me or some other of Her Majesty's justices of the peace for the said to be disposed of and dealt with according to law.

Given under my hand and seal this day  
of in the year of our Lord One  
thousand and eight hundred and  
(Signed) (L.S.)

## THIRD SCHEDULE.

## PRELIMINARY COSTS.

Sections 34,  
129, 134.

*Civil Cases—*

Summons including duplicate copy but not service a fee of ... ..	£0	2	6
Every duplicate copy beyond one a fee of ...	0	1	0
Service on each defendant (if the distance from the constable's residence does not exceed five miles) a fee of ... ..	0	2	6
If beyond that distance per every additional mile for each defendant a fee of ...	0	1	0
Warrant of apprehension a fee of ... ..	0	2	6

Executing any such warrant (if the distance does not exceed five miles from the constable's residence for each defendant) a fee of ... ..	£0	2	6
If beyond that distance per every additional mile for each defendant a fee of ...	0	1	0

*Criminal Cases—*

Summons including duplicate copy and service a fee of ... ..	0	2	6
Every duplicate copy beyond one including service a fee of ... ..	0	1	0
Warrant of apprehension in cases not of treason felony or misdemeanor including execution thereof a fee of ... ..	0	2	6
Warrant of apprehension in cases of treason felony or misdemeanor ... ..	0	0	0

*Civil and Criminal Cases—*

Summons to witnesses including any number of names a fee of ... ..	0	1	0
Every duplicate thereof a fee of ... ..	0	0	6
Service thereof (if required to be served by a constable) on each witness if the distance from the constable's residence does not exceed five miles a fee of ... ..	0	2	6
If beyond that distance per every additional mile for each witness a fee of ... ..	0	1	0

## COSTS AND CHARGES OF "DISTRESS" OR OF "TAKING AND KEEPING A DISTRESS."

*Civil Cases—*

Warrant of distress a fee of ... ..	0	2	6
Executing any such warrant (not including the expenses of removal possession or sale) if the distance does not exceed five miles from the constable's residence for each defendant a fee of ... ..	0	2	6
If beyond that distance per every additional mile for each defendant a fee of ... ..	0	1	0
Expenses of possession not exceeding per day ... ..	0	5	0
Expenses of removal (including storage) of goods not exceeding ... ..	1	10	0
Expenses of sale for every twenty shillings or fraction of twenty shillings of the price realised ... ..	0	0	6

*Civil and Criminal Cases—*

Conveying to gaol the amount mentioned in the warrant.

## MISCELLANEOUS FEES.

*Civil and Criminal Cases—*

Case and copy where the case does not exceed five common law folios...	...	...	£0	10	0
Where it exceeds five common law folios for every additional folio	...	...	0	1	0
Certificate of refusal of case	...	...	0	2	6
Every recognizance (except in cases of treason felony or misdemeanor)	...	...	0	5	0
Every renewal or enlargement thereof	...	...	0	2	6
Every copy of any complaint information summons warrant deposition order or conviction obtained after any hearing or examination and not exceeding one common law folio	...	...	0	1	0
For every folio or fraction beyond the first folio	...	...	0	1	0

# APPENDIX.

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## APPENDIX A.

WHILE the author was Minister of Justice, the following opinion was obtained from Dr. Mackay, and then circulated among the justices for their information. A copy has been obtained from the Hon. G. B. Kerferd, the present Solicitor-General, and with his permission is now published here.

*With reference to the decision of the Supreme Court in the case of Burke v. Smibert (18th June, 1869), counsel will be so good as advise as to the cases in which an infant may take proceedings before justices without his guardian or next friend being joined, giving authorities as fully as possible.*

REPLY:—The decision by the justices in *Burke v. Smibert*, *supra*, appeared to have been made on an erroneous conception of the decision by the Supreme Court, 5th July, 1866, in *Reg. v. Charles*, 3 W. W. & A'B., 53, Law. Now, it is to be observed that in *Burke v. Smibert* the proceeding was in the nature of a prosecution for an unlawful assault, for which jurisdiction is given to justices to impose a fine not exceeding £10 on a defendant guilty of assault (*see* 27 Vict., No. 233, s. 38, 1st vol. Vict. Stats., 466; and 28 Vict., No. 265, s. 15, 3rd vol. Vict. Stats., 116), while the proceeding in reference to which perjury was assigned in *Reg. v. Charles* was in the nature of a summary action under 28 Vict., No. 267, s. 41, 2 Vict. Stats., 243, to recover damages for the injury committed by the defendant in assaulting the plaintiff's son, James Somerville. The error in the proceeding in this latter case was in instituting the proceeding in the name of the father William, and this led to the quashing of the conviction, for the sound reason given by the court:—"It was not, therefore, the complaint of the person injured." No authority is reported as cited in the argument of counsel or in their Honors' judgment, but *Reg. v. Denny*, 2 L. M. & P., 230, supports this decision. But for the *portion in italics* of the following sentence contained in the judgment of the court in *Reg. v. Charles*, I would be of opinion that an infant could sue for damages in an action for assault in Petty Sessions by *prochein ami* or guardian. The sentence I refer to is as follows:—"Besides we are not aware of any law by which the son, an infant, could sue in his own name, *not even by next friend, in the Police Courts.*" The words "*not even by next friend*" must have arisen from a misconception by the learned reporters of what fell from the court, and I understood His Honor the learned Chief Justice to have said so in giving judgment, or in



the course of the argument, in *Burke v. Smibert*; my conception of what the law is in this respect, is that the colonial statute 28 Vict., No. 267, s. 41, 2nd Vol. Vict. Stats., 243, having conferred jurisdiction upon two justices to hear and determine complaints in a summary way for damages for assaults not exceeding £20, and the subject matter having thus been committed to justices, the common law attaches, and an adult male, or adult unmarried female, may sue in his or her own name: an infant, by *prochein ami* or guardian. It is worth while to remember the progress of legislation as far as regards the present matter respecting common assaults; assaults were like all other misdemeanors at common law, only punishable by an indictment tried by a jury. Sir Robert Peel introduced his criminal statutes amending the law, one of which, 9 Geo. IV., c. 31, s. 27, reciting that it was expedient that a summary power of punishing persons for common assaults and batteries should be provided for, enacted that two justices should have power to impose on a defendant convicted of a common assault a fine of £5—to go to the poor—or two months' imprisonment. Thus, for the first time, a *summary* mode of dealing with common assaults was provided for. This new mode was in the nature of a criminal proceeding, and the punishment awarded was for the *breach of the peace*—not to give damages to the person assaulted, as in proceedings by indictment the person assaulted or informant was only a witness, the prosecution being in the name of the King or Queen, who had the charge of the public peace; so in the new summary criminal proceeding the complainant is only a witness, getting no compensation. He is still the complainant or informant; but the proceedings are really, if not nominally, at the suit of the Queen; and, as an infant could be a witness, and lay an information under the old proceeding by indictment, so also he can do in the summary proceeding in his own name, in his character of witness. The analogy is evident; in proceedings by indictment it is the vindication of the public peace by the *punishment* of the defendant, by fine or imprisonment, which is the object. In summary criminal proceedings likewise the object is the vindication of the public peace by the punishment of the defendant—also by fine or imprisonment—and not, in either case, the compensating the person aggrieved by giving him *damages*. And the analogy will be further observed in the disposition of the fine, where a fine is imposed; as on proceedings by indictment, the fine is paid into the Queen's Treasury, and so the public get relief from general taxation to the extent of the fine; while in summary proceedings in England the fine goes in relief of local taxation, and in this colony it is also in like manner similarly appropriated or nearly so (*see* Stats., 21 Vict., No. 22, s. 9, 2nd vol. Stats., 194; 28 Vict., No. 265, s. 65)—(1). It will be thus seen that in summary proceedings the tribunal alone is changed. This Act of 9 Geo. IV., c. 31, came into force by virtue of the New South Wales Constitution Act, 9 Geo. IV., c. 83, in this colony, and remained in force here till Victorian Act 16 Vict., No. 14; 1 Adamson, 516, where by section 6 the fine was increased to £20, and the alternative imprisonment to three months; and at the same time a portion of the fine not

exceeding one-half was, in the discretion of the justices, to go to the complainant. The English County Courts Act, 9 and 10 Vict., c. 95 (which amended two previous Acts), from which chiefly our Victorian Colonial County Courts Acts are taken, by sect. 58 gave jurisdiction in all pleas of *personal* actions, including actions for damages for assaults (I do not refer to the exceptions). It will be unnecessary to notice the old colonial County Courts Acts further than to say that the 16 Vict., No. 11, and 17 Vict., No. 21; 1 Adamson, 392, 406, gave jurisdiction amongst other things to these courts to hear and determine actions for damages for assaults. The County Court Act of 1857, 21 Vict., No. 29; 3 Adamson, 1963, by sect. 21 gave jurisdiction in all pleas of *personal* actions to recover damages in actions, amongst other things for assaults, up to £250, and by section 22 jurisdiction is conferred on justices to award damages up to £20 to a complainant for an assault. Section 27 enables infants to sue and be sued; section 47 empowers appearance by the suitor, his attorney, or counsel. The jurisdiction is virtually continued by 28 Vict., No. 261, sect. 22, 1st vol. Stats., 427, repealed and re-enacted by 29 Vict., No. 282 (page 443), sect. 2, as to actions for £250; the enactment as to infants suing and being sued in their own names being continued in sect. 27, page 427. It is to be observed that the provision in sect. 22, 21 Vict., No. 29, conferring the jurisdiction above referred to in certain specified actions, including assaults for damages up to £20, on justices, is omitted from the Consolidating Acts 28 Vict., No. 261, and 29 Vict., No. 282, and is transferred to the Justices of the Peace Statute, 1865, 28 Vict., No. 267, sect. 41, 2nd vol. Stats., 243, while at the same time no provision is made in the latter Act to enable infants to sue and be sued in their own names. Thus while infants can institute proceedings, as informants or witnesses in their own names, *for offences* committed upon them before justices, they are not enabled by statute to sue in their own names before justices in matters in which debt or damages may be recovered, as in the County Courts; and I take it, if I am correct as to the common law attaching where the statute confers jurisdiction over the subject-matter, proceedings must be taken on behalf of an infant before justices in these latter cases in the name of his *prochein ami* or guardian. I may observe that the 43rd section of No. 267 does not impliedly confer jurisdiction; its effect obviously is to exclude from the cognizance of justices all those cases in which a County Court has no jurisdiction; but of course it does not follow that justices thereby have all the jurisdiction of the County Courts.

It may be said that if a complaint be instituted by an infant in his own name before justices for an assault or other misdemeanor, in which they have jurisdiction to convict summarily, and the complaint be dismissed, the defendant, if costs be awarded, would be without remedy; but this is not a sound objection—for, first of all there must be a complaint or information before summons—and the probabilities would be weighed by the justices before issuing a summons (*see* sect. 58 of No. 267) as to whether an offence was committed—and no justice

would subject a person to be made a defendant, wantonly or without a *prima facie* case having been first made out. Secondly, there is the alternative of imprisonment (*see* sect. 116) in case of a return of *nulla bona*, and infancy would be no excuse (*see ex parte Williams*) where it was decided that infancy was not a ground for discharging a forfeited recognizance to appear at the assizes to prosecute for felony (13 *Price*, 573, Exchequer). In *Defries v. Davis*, 1 *Bing*, N.C., 692, it was decided by the Common Pleas that that court had no jurisdiction to discharge from custody an infant in execution for damages in an action of slander. The same court, in *Burnard v. Haggis* (32 *L.J.*, C.P., 189), held that in an action for a *tort*, independent of contract (injury to a horse), the defendant, an infant, was liable for the injury done to the horse; and the Court of King's Bench, in *Finley v. Jowle* (13 *East*, 6), refused on motion to discharge an infant plaintiff, who had sued without *prochein ami* or guardian, and was in execution for the costs. Again, it may be objected that the Acts giving jurisdiction to justices to hear and determine complaints for assaults in the nature of indictments summarily, are penal Statutes, and that as the 18th Elizabeth, c. 5, enacts that informers upon penal Statutes must sue in person or by attorney, and therefore an infant cannot sue, and *Maggs v. Ellis* (*Buller's N.P.*, 196) may be cited. The same law is given in 4 *Bac. Abridg.*, 382 (7th ed., 1832), in a note citing *Say. Rep.*, 51. But it must be remembered that by *penal Statutes* are meant those in which *qui tam* actions, by common informers, are instituted for recovery of statutable penalties, and are called *popular actions*, because any one of the *populus* may sue, though he be no way personally damnified (*see* 3 *Black. Com.*, 161, 21st ed., 1844). Such actions, as in *Simpson v. Ready* (12 *M. & W.*, 736), for penalties under municipal corporations; *Beilby v. Scott* (7 *M. & W.*, 93), for not taking a pilot on board ship; *Clark v. Powell* (4 *B. & Ad.*, 846), for acting as a stock-broker; it is unnecessary to quote from 3 *Comyns's Digest* 559 (5th ed., 1822), title, "Enfant," and the only further quotation I shall make is the following, from 4 *Bacon's Abridgment*, 382, same edition as above referred to, title, "Infancy and Age" (K)—"2. Regularly, an infant plaintiff must appear by *prochein ami* or guardian, but must defend by guardian; but in neither case can he appear by attorney, for an attorney's appearing for him is without warrant, for an infant cannot give him authority *ad perdend.* and *lucrand.*, as the warrant of attorney purports, and therefore he is to appear by guardian;" &c., &c.

From the foregoing I conclude that in all criminal proceedings to be instituted before justices of the peace for *offences* against an infant cognizable by justices, the proceedings are to be instituted in the name of the infant as informant or complainant; while in proceedings of a civil nature, for the recovery of debt or damages, the proceedings must be commenced by *prochein ami* or guardian, except where any Statute expressly gives the power to sue before justices in the name of the infant, and I am at present not aware of any except the provision already referred to in the County Courts Act, and a like provision contained in

the 104th section of the Mining Statute, 29 Vict., No. 291, 2nd vol. Stat., 545. There is a useful note in *Paley on Convictions*, 60 (4th ed., 1865), note *x*.

The form of the summons will in each case guide magistrates as to what should be their judgment in each form of proceeding; that is, assuming that their decision will be against the defendant. If it be for an *illegal assault*, then it will be A CONVICTION, and an award of fine or imprisonment, the proceedings being in the nature of a *criminal* prosecution. If the summons *claims damages* for the assault, it will be an ORDER, awarding damages. In the former, the complaint or information will be in the *name of the infant*; in the latter, in the *name of his or her next friend*.

It might be desirable to have a short Statute introduced, to enable infants to sue and be sued in all proceedings before justices of the peace.

GEO. MACKAY.

23 Temple Court, 15th July, 1869.

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